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No. 13091

United States
Court of Appeals
for the Ninth Circuit.

WESTERN BOAT BUILDING COMPANY, a
Partnership, and UNITED PACIFIC INSUR-
ANCE COMPANY, a Corporation,

Appellants,

vs.

J. J. O'LEARY, Deputy Commissioner, 14th Com-
pensation District, Under the Longshoremen's
& Harbor Workers' Compensation Act and
ROBERT MARKOVICH,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington
Southern Division

FILED

NOV 14 1951

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Seattle, Washington,
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United States Attorney;

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Assistant United States Attorney,
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Tacoma, Washington,
Attorneys for J. J. O'Leary, Deputy
Commissioner, 14th Compensation
District, etc.

BURTON W. LYON, JR.,
Puget Sound Bank Building,
Tacoma, Washington,
Attorney for Defendant Robert Markovich.

In the District Court of the United States for the
Western District of Washington, Southern
Division

No. 1449

WESTERN BOAT BUILDING COMPANY, a
Partnership, and UNITED PACIFIC IN-
SURANCE COMPANY, a Corporation,

Plaintiffs,

vs.

J. J. O'LEARY, Deputy Commissioner, 14th Com-
pensation District, Under the Longshoremen &
Harbor Workers' Compensation Act.

Defendant.

PETITION FOR INJUNCTION

Come Now Western Boat Building Company, a
co-partnership, and United Pacific Insurance Com-
pany, a corporation, plaintiffs herein, and for
cause of action against the defendant, plaintiff's
allege:

I.

That plaintiff Western Boat Building Company
is and during all times material to this petition was
a copartnership existing under the laws of the state
of Washington, engaged in the business of boat
building and repair at Tacoma, Washington, and
is an employer within the provisions of the Long-
shoremen & Harbor Workers' Act (hereinafter re-
ferred to as the "Act"), U.S.C. Title 33, Sections
901 to 951 inclusive.

II.

That plaintiff, United Pacific Insurance Company, is now and at all times mentioned herein was an insurance company organized as a corporation under and by virtue of the laws of the state of Washington, with its principal place of business at Tacoma, Washington, and was an insurance carrier securing the insurance of the plaintiff Western Boat Building Company, in accordance with the terms and provisions of said Act.

III.

That the defendant, J. J. O'Leary, is now and at all times mentioned, was the Deputy Commissioner of the Fourteenth Compensation District, administering the provisions of said Act.

IV.

That on October 18, 1950, one Robert Markovich was employed by plaintiff Western Boat Building Company as a shoreside fastener. That while working aboard the tug El Sol which had been pulled out of the navigable waters of Tacoma Harbor onto the shore by plaintiff's marine railway, the said Markovich fell from said tug to the shore below, striking on some rocks and timbers on the beach upon which he fell, sustaining disabling injuries to his back.

V.

That the marine railway upon which the tug El Sol was cradled at the time of Markovich's accident is an instrumentality whereby the cradle thereof is floated in and upon navigable waters and

inserted under the bottom of the vessel to be repaired; that said cradle rests upon and runs upon two steel rails from the water onto the shore; that after being cradled as aforesaid the vessel is pulled out of the navigable waters on said cradle to the shore where the vessel rests and work is thereupon performed while the vessel is so resting on the shore.

VI.

That the injury to Markovich did not occur upon the navigable waters of the United States of America, but upon the shorelands of the State of Washington, and the jurisdiction of injuries occurring to the plaintiff's employees is exclusively vested in the Workmen's Compensation Act of the State of Washington.

VII.

That following his aforesaid injury the said Marvovich duly and regularly filed his claim for compensation with the Washington State Department of Labor and Industries under the Washington Workmen's Compensation Act, and said claim was allowed on December 14, 1950, by said Department, being Claim No. B-811942; that the said Markovich has to date received three payments of monthly compensation under the terms and provisions of the Workmen's Compensation Act from the Department of Labor and Industries, on December 14, 1950; December 20, 1950, and January 22, 1951.

That thereafter, on January 10, 1951, the said Markovich also filed a claim with defendant J. J.

O'Leary under the Longshoremen & Harbor Workers' Compensation Act; that the plaintiffs controverted said claim upon the ground that the plaintiff's injury did not occur on navigable waters of the United States and was not within the jurisdiction of the Longshoremen & Harbor Workers' Act.

VIII.

That on February 26, 1951, a hearing was held before defendant J. J. O'Leary, Deputy Commissioner, which resulted in a compensation order and award of compensation being filed by the said J. J. O'Leary on March 20, 1951, wherein the said J. J. O'Leary unlawfully and illegally attempted to assume jurisdiction of Markovich's injury; that a copy of said compensation order and award of compensation is attached hereto, marked Exhibit "A" and by reference made a part hereof as though fully set forth herein.

IX.

That a certified copy of the transcript of testimony taken at said hearing, together with all exhibits received in evidence in connection therewith, will be filed in this cause under the certificate of the Deputy Commissioner, which said testimony and exhibits are by this reference made a part hereof and incorporated herein as though fully set forth.

X.

That the sole question adjudicated by the Deputy Commissioner was whether the injury to the said

Markovich was within the jurisdiction of the Longshoremen & Harbor Workers' Act.

XI.

That Section 3(a) of the Longshoremen & Harbor Workers' Act provides as follows:

"Compensation shall be payable under this Act in respect to disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for disability or death through workmen's compensation proceedings may not validly be provided by state law."

XII.

That in the case of *Norton vs. Vesta Coal Co.*, 63 F. (2d) 165, it was adjudicated by the Third Circuit Court of Appeals that a marine railway located on land and similar to the marine railway of plaintiff Western Boat Building Company was not within the jurisdiction of the Act. That an appeal from said decision was thereupon taken to the Supreme Court of the United States by the Deputy Commissioner by writ of certiorari. That on January 15, 1934, in the appeal of said cause, reported in 78 L. Ed. 536, 290 U. S. 613, appears the following order of the Supreme Court:

"Per curiam as it appears that the government has now adopted the conclusion that the decision below is correct and no substantial controversy is presented at the bar of this Court, the writ of certiorari herein is dismissed."

XIII.

That on July 1, 1937, the Supreme Court of the State of Washington in the case of Rholfs vs. Department of Labor & Industries, Wash. 190 Wp. 566, held that marine railways were subject to the exclusive jurisdiction of the Workmen's Compensation Act of the State of Washington.

XIV.

That the Supreme Court of the United States has held in the case of Davis vs. Dept. of Labor & Industries, 317 U. S. 249, 87 L. Ed. 246, that in questions of apparent conflicts of jurisdiction between the Washington Workmen's Compensation Act and the Longshoremen & Harbor Workers' Act, a workman by filing a claim under the said Workmen's Compensation Act makes a valid election for compensation purposes and it is legal and lawful for the Washington Workmen's Compensation Act to assume exclusive jurisdiction of such a claim.

XV.

That even if defendant J. J. O'Leary had jurisdiction to enter said order, said order is not in accordance with law, since it fails to provide credit in said order to the plaintiff for the payments previously received by the said Markovich under the terms and provisions of the Workmen's Compensation Act of the State of Washington.

XVI.

That the said compensation order and award of defendant J. J. O'Leary, dated March 20, 1951, is

not in accordance with law, is arbitrary, capricious, and should be suspended permanently, set aside, and held for naught.

XVII.

That less than thirty days have elapsed since the entry and filing of said compensation order and award of compensation and the plaintiffs have no relief or adequate remedy at law.

Wherefore, plaintiffs pray for judgment as follows:

1. That a decree be entered herein, adjudging said compensation order and award of defendant J. J. O'Leary dated March 20, 1951, and attached hereto and made a part hereof as Exhibit "A" to be unlawful and contrary to the provisions of said Act, and directing and ordering that said award be suspended, vacated and set aside, and that the defendant J. J. O'Leary be permanently enjoined from enforcing the same.

2. For such other further or different relief as to the court may seem equitable and just.

BOGLE, BOGLE & GATES,

/s/ EDW. S. FRANKLIN,

Attorneys for Plaintiffs.

State of Washington,
County of King—ss.

Edw. S. Franklin, being first duly sworn, on oath deposes and says: That he is one of the attorneys

for the plaintiffs in the above-entitled action; that he makes this verification on behalf of said plaintiffs as he is so entitled to do; that he has read the foregoing Petition, knows the contents thereof, and believes the same to be true.

/s/ EDW. S. FRANKLIN.

Subscribed and Sworn to before me this 23rd day of March, 1951.

[Seal] /s/ ROBERT V. HOLLAND,
Notary Public in and for the State of Washington,
Residing at Seattle.

EXHIBIT A

U. S. Department of Labor
Bureau of Employees' Compensation
Case No. 217-21

In the Matter of the Claim for Compensation Under the Longshoremen's and Harbor Workers' Compensation Act

ROBERT MARKOVICH,

Claimant,

vs.

WESTERN BOAT BUILDING COMPANY,
Employer,

UNITED PACIFIC INSURANCE COMPANY,
Insurance Carrier.

COMPENSATION ORDER AWARD OF COMPENSATION

Such investigation in respect to the above-entitled claim having been made as is considered necessary,

and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

Findings of Fact

That on the 18th day of October, 1950, the claimant above named was in the employ of the employer above named at Tacoma, State of Washington, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under the said Act was insured by the United Pacific Insurance Company; that on said date the claimant herein, while performing service as a Fastener for the employer and engaged in work incidental to the repair of the tugboat *El Sol* which was then located on a marine railway at the yard of the employer, sustained personal injury resulting in his disability, when, while walking alongside a lifeboat on the upper deck of said vessel, he lost his balance and fell over the side of the vessel, a distance of approximately 40 feet, in consequence of which he suffered a compression fracture of the first lumbar vertebra, multiple abrasions and contusions of shoulders and left ribs; that the marine railway on which the vessel was located is approximately 150 feet long and the lower portion of same extends into the water; that during the time the vessel was undergoing repairs on said marine railway, the stern of the vessel was partially submerged in the navigable waters of Puget Sound at high tide; that the employment in which the claimant

was engaged at the time of his injury was maritime in nature and that said injury occurred upon navigable waters of the United States and comes within the purview of the Longshoremen's and Harbor Workers' Compensation Act; that written notice of injury was not given within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice; that the employer furnished the claimant with medical treatment, etc., in accordance with the provisions of Section 7(a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to \$2,936.75; that as a result of the injury sustained the claimant was wholly disabled from October 19, 1950, to March 14, 1951, on which date he was still so disabled, and he is entitled to 21 weeks compensation at \$35.00 per week for such temporary total disability; that the accrued compensation for temporary total disability to March 14, 1951, inclusive, amounts to \$735.00; that the employer and insurance carrier have paid nothing to the claimant as compensation.

Upon the foregoing facts, the Deputy Commissioner makes the following

Award

That the employer, Western Boat Building Company, and the insurance carrier United Pacific Insurance Company, shall pay to the claimant compensation as follows: 21 weeks at \$35.00 per week for temporary total disability from October 19,

1950, to March 14, 1951, inclusive, in the amount of \$735.00, which amount the employer and carrier are directed to pay forthwith in one sum (less attorney's fee hereinafter provided for) and shall thereafter Continue payments of compensation at the rate of \$35.00 per week until disability shall have ceased or until further order of the Deputy Commissioner.

A fee in the amount of \$75.00 is hereby approved in favor of Attorney Burton W. Lyon, Jr., for services rendered the claimant in connection with the presentation of his claim for compensation, same to be a lien upon and deducted from the payment of this award.

Given under my hand at Seattle, Washington, this 20th day of March, 1951.

/s/ J. J. O'LEARY,
Deputy Commissioner, 14th
Compensation District.

Proof of Service

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer, and the insurance carrier, at the last known address of each as follows:

Mr. Robert Markovich, 3822 So. Asotin, Tacoma 8, Wash.

Western Boat Building Company, 2505 E. 11th Street, Tacoma, Wash.

United Pacific Insurance Company, P. O. Box 1216, Tacoma, Wash.

Regular Mail

Atty. Burton W. Lyon, Jr., 507 Puget Sound Bank Bldg., Tacoma, Wash.

Bogle, Bogle & Gates, Attys., Central Bldg., Seattle 4, Wash.

Mailed March 20, 1951.

/s/ J. J. O'LEARY,

J. J. O'LEARY,

Deputy Commissioner.

JJO:mlc

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

MOTION FOR INTERLOCUTORY INJUNCTION TO STAY PAYMENT OF COMPENSATION

Comes Now plaintiff, Western Boat Building Company, and moves the Court for an order staying any payments of amounts required by the compensation order filed by defendant J. J. O'Leary as Deputy Commissioner on March 20, 1951, until final decision in this proceeding for the reason that irreparable damage will otherwise ensue to the employer herein if said award is not stayed.

This motion is based upon the petition for injunction filed herein, and upon the supplemental affidavit of Edw. S. Franklin, one of the attorneys

for plaintiffs, attached hereto and made a part hereof.

BOGLE, BOGLE & GATES,

/s/ EDW. S. FRANKLIN,

Attorneys for Plaintiffs.

State of Washington,
County of King—ss.

Edw. S. Franklin, being first duly sworn upon oath, deposes and says:

That he is one of the attorneys for the plaintiffs herein and makes the within affidavit in support of plaintiff's motion to stay the payments of compensation required by the order and award of defendant J. J. O'Leary, dated March 20, 1951, until final decision of this proceeding.

That under the terms of said order, the plaintiff Western Boat Building Company is required to pay to the claimant Markovich within ten days from October 20, 1950, the sum of \$735.00 as well as to make continuing compensation payments thereafter.

That if said payment of \$735.00 is not made within said time, said award will carry an additional penalty of 20 per cent of the amount of said compensation payments found due by said order, to be assessed against said employer.

That the injured workman, Robert Markovich, is propertyless and insolvent, and it would be financially impossible to recover any payments of compensation paid said claimant if said order of the Deputy Commissioner is subsequently reversed.

That the order of the Deputy Commissioner under date of March 20, 1951, is arbitrary, capricious, and not in accordance with law, and takes the plaintiff's property without due process of law.

/s/ EDW. S. FRANKLIN.

Subscribed and Sworn to before me this 23rd day of March, 1951.

[Seal] /s/ ROBERT V. HOLLAND,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

MOTION TO INTERVENE
AS DEFENDANT

Comes now Robert Markovich and moves for leave to intervene as defendant in the above-entitled action in order to assert defenses which the applicant has to the matters referred to in the motion and petition of the plaintiffs for an interlocutory injunction to stay the payment of compensation award by the defendant to the applicant for intervention in that certain proceedings before the defendant entitled "In the matter of the claim for compensation under the Longshoremen & Harbor Workers' Compensation Act, Robert Markovich, Claimant, vs. Western Boat Building Company, employer; United Pacific Insurance Company, in-

surance carrier, Case No. 217-21'' upon which the above-entitled proceeding is based, and from which proceedings the plaintiff is making appeal to all of which matters the applicant for intervention has defenses to plaintiff's said petition and motion for an interlocutory injunction and appeal in the above-entitled proceedings.

Dated this 28th day of March, 1951.

/s/ BURTON W. LYON, JR.,
Attorney for Applicant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 29, 1951.

[Title of District Court and Cause.]

ORDER ALLOWING ROBERT MARKOVICH
TO INTERVENE

The matter of the motion of Robert Markovich for leave to intervene in the above proceedings having come on regularly before the court for hearing on Thursday, the 29th day of March, 1951, and the applicant for intervention being represented by his attorney, Burton W. Lyon, Jr., and the plaintiffs being represented by their attorney, Edward S. Franklin, and the defendant J. J. O'Leary being represented by the Honorable J. Charles Dennis, the United States District Attorney, and Guy A. B. Dovell, Assistant United States Attorney, and the said attorneys for the plaintiffs and the defendant

having stipulated in open court that there was no objection to the application of Robert Markovich for leave to intervene in the above-entitled proceedings.

It Is Hereby Ordered, Adjudged and Decreed, That Robert Markovich be and he is hereby authorized and allowed to intervene in the above-entitled proceedings.

Done in Open Court this 2nd day of April, 1951.

/s/ CHARLES H. LEAVY,
United States District Judge.

Presented by:

/s/ BURTON W. LYON, JR.,
Attorney for Intervener.

[Endorsed]: Filed April 2, 1951.

[Title of District Court and Cause.]

DEFENDANT O'LEARY'S ANSWER
TO PETITION

Defendant J. J. O'Leary, by his attorneys, for his answer to the petition:

1. Admits the allegations in the petition contained in paragraphs numbered 1, 2, 3, 7, 11, 17.

2. Admits that on October 18, 1950, one Robert Markovich was injured while employed as a "fastener" aboard the tug El Sol, which was on a marine railway, when he fell from said vessel. Denies each

and every other allegation in said complaint, particularly that the injured employee fell on dry land.

3. Admits that the vessel upon which Markovich was working was pulled up part way out of the water on a marine railway but denies that the vessel was completely out of the water.

4. Denies the allegations in paragraphs in the petition numbered 6, 16.

5. Admits that the deputy commissioner on March 20, 1951, filed a compensation award in favor of the injured employee but denies that said action was unlawful as alleged in paragraph 8.

6. That insofar as plaintiff's attempt to interpret certain court decisions in paragraphs numbered 12, 13 and 14 of the petition, defendant neither admits nor denies the correctness of said interpretations but begs leave to refer to said decisions in his brief.

7. Defendant admits that any sums shown to have been paid to the injured employee as compensation by plaintiffs pursuant to the Workmen's Compensation Law of the State of Washington are the proper subject of credit against the payments due under an award made pursuant to the provisions of the Longshoremen's Act.

Wherefore Defendant O'Leary prays that the petition be dismissed.

/s/ J. CHARLES DENNIS,

United States Attorney;

/s/ GUY A. B. DOVELL,

Assistant United States Attorney, Attorneys for
Defendant O'Leary.

Receipt of copy acknowledged.

[Endorsed]: Filed June 4, 1951.

[Title of District Court and Cause.]

INTERVENOR MARKOVICH'S ANSWER
TO PETITION

Intervenor Robert Markovich, by his attorney, for his answer to the petition:

1. Admits that allegations in the petition contained in paragraphs numbered 1, 2, 3, 11, 17.

2. Admits that on October 18, 1950, one Robert Markovich was injured while employed as a "fastener" aboard the tug El Sol, which was on a marine railway, when he fell from said vessel. Denies each and every other allegation in said complaint, particularly that the injured employee fell on dry land.

3. Admits that the vessel upon which Markovich was working was pulled up part way out of the water on a marine railway but denies that the vessel was completely out of the water.

4. Denies the allegations in paragraph 6 of the petition.

5. Admits that on January 10, 1951, Markovich filed a claim with the defendants J. J. O'Leary under the Longshoremen and Harbor Workers' Compensation Act, and that the plaintiffs controverted said claim and further admits that the intervenor, Markovich has to date received three payments of monthly compensation under the terms and provisions of the Workmen's Compensation Act from the Department of Labor and Industries; the intervenor denies each and every other allegation in paragraph 7.

6. Admits that on February 26, 1951, a hearing was held before the defendants, O'Leary, and that on March 20, 1951, the defendant, O'Leary, filed a compensation award in favor of the intervenor, Markovich, but denies that said action was unlawful as alleged in paragraph 8 of the petition.

7. Denies the allegations contained in paragraph 10 of the petition.

8. Denies that the conclusions stated and inferences drawn from the quotations stated in paragraphs 12, 13 and 14 of the petition correctly state the law applicable to the facts of the above-entitled proceedings.

9. Denies the allegations contained in paragraphs 15 and 16 of the petition.

Wherefore Intervenor Robert Markovich prays

that the petition be dismissed and the intervenor recover cost and attorney's fees.

/s/ BURTON W. LYON, JR.,
Attorney for Intervenor.

[Endorsed]: Filed June 5, 1951.

United States District Court, Western District of
Washington, Southern Division

No. 1449

WESTERN BOAT BUILDING COMPANY, a
Partnership, and UNITED PACIFIC IN-
SURANCE COMPANY, a Corporation,

Plaintiffs,

vs.

J. J. O'LEARY, Deputy Commissioner, 14th Com-
pensation District, Under the Longshoremen's
& Harbor Workers' Compensation Act,

Defendant,

ROBERT MARKOVICH,

Intervenor.

ORDER OF DISMISSAL

The above-entitled cause coming on regularly to be heard before the court on July 5, 1951, upon plaintiffs' petition for injunction and upon the separate answers thereto of the above-named deputy commissioner, and the intervening claimant, and the plaintiffs thereupon having interposed their

motion for trial de novo upon the question of difference between a marine railway and the term "any dry dock" and if intervenor was injured on navigable waters of the United States, within the meaning of the Longshoremen's and Harbor Workers' Act, with the offer of expert testimony thereon, on the ground that the same involved a jurisdictional fact and was open to review, and the court having received the memorandum of the deputy commissioner thereon and heard and considered the arguments of counsel, and it appearing to the court that evidence upon the alleged question of jurisdictional fact has been fully and completely presented before the deputy commissioner and that the plaintiffs do not allege that they have newly discovered evidence or different evidence to present to the court, nor do plaintiffs advance any other valid reason why there should be a new record, and it also appearing that such matter of trial de novo is within the discretion of the court, and the court having for such reasons denied the motion therefor, and the court having thereupon proceeded to hear and determine this matter upon the transcript of the record of hearing before the deputy commissioner herein filed and upon the respective briefs of counsel herein directed to be filed, and the plaintiffs having conceded that there was substantial evidence to support the deputy commissioner's findings on factual issues and confined the issues herein to the legal correctness of the deputy commissioner's conclusion that such accident occurred upon the navigable waters of the United States and came

within the purview of the said Act, and to the further question of the legal effect of acceptance of payments allowed claimant under the Washington Workmen's Compensation Act, as appears from the record; and the court having heard the oral arguments of counsel, and it appearing to the court that an examination of the record discloses that there is adequate support for all of the deputy commissioner's findings, and that his order is in accordance with law and comes within the scope of the Act as applied, and it further appearing to the court that the payments from the state were voluntary and without an award of compensation under the Workmen's Compensation Act of said state, and were not prejudicial to the rights of the claimant thereafter to claim compensation under the Longshoremen's and Harbor Workers' Compensation Act, and that the principle of "first come, first serve," as enunciated by the Supreme Court in *Davis vs. Department of Labor and Industries*, 317 U. S. 249, is not, upon the record, applicable in this case, and it, therefore, appearing to the court that the compensation order should be affirmed and the petition for injunctive and other relief should be denied, and dismissed, it is now, therefore,

Ordered, Adjudged and Decreed that the Compensation Order and award of Compensation of the Deputy Commissioner, filed in this court and cause, be and the same is in all respects hereby affirmed and determined in accordance with law; and it is further

Ordered, Adjudged and Decreed that any sums shown to have been paid to the claimant as compensation pursuant to the Workmen's Compensation Act of the State of Washington shall be credited against the payments due claimant under award made pursuant to the provisions of the Longshoremen's Act; and it is further

Ordered, Adjudged and Decreed that Burton W. Lyon, Jr., Counsel for intervenor, be and he is hereby allowed \$250.00 as attorney's fee to be paid from intervenor's compensation award herein and it is lastly

Ordered, Adjudged and Decreed that plaintiff's motion for preliminary injunctive relief from payments pending further proceedings, admittedly made in behalf of the insurance carrier, and not the employer, has no basis in law, and the same and plaintiffs' petition herein filed is denied, except as otherwise provided by the stipulation of the parties filed herein, and that the above-entitled action be and the same is hereby dismissed with costs to defendants.

The plaintiffs, by counsel, except to the foregoing rulings of the court and such exceptions are hereby allowed.

Done in Open Court this 17th day of July, 1951.

/s/ J. FRANK McLAUGHLIN,
United States District Judge.
Sitting by Assignment.

Approved and Presented by:

GUY A. B. DOVELL,
Of Counsel for Deputy Commissioner J. J. O'Leary,
Respondent Above Named.

/s/ BURTON W. LYON, JR.,
Attorney for Intervening Claimant, Robert Marko-
vich, Intervenor Above Named.

Approved as to Form Only:

BOGLE, BOGLE & GATES,
/s/ EDW. S. FRANKLIN,
Of Counsel for Plaintiffs.

Entered July 17, 1951.

[Endorsed]: Filed July 17, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To J. J. O'Leary, Deputy Commissioner, 14th Compensation District, under the Longshoremen's & Harbor Workers' Compensation Act, Plaintiff herein; and to the Honorable J. Charles Dennis, United States District Attorney, and Guy A. B. Dovell, Assistant United States District Attorney, his attorneys; and to Robert Markovich, Intervenor, and to Burton W. Lyon, Jr., his attorney:

Notice Is Hereby Given that the plaintiffs above named, Western Boat Building Company, a part-

nership, and United Pacific Insurance Company, a corporation, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order entered in the above court on the 17th of July, 1951, dismissing plaintiffs' petition for an injunction, and from each and every part of said Order.

Dated this 7th day of August, 1951.

BOGLE, BOGLE & GATES,

/s/ EDW. S. FRANKLIN,

Attorneys for Plaintiffs, Western Boat Building Company, a Partnership, and United Pacific Insurance Company, a Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed August 7, 1951.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, Western Boat Building Company, a partnership, and United Pacific Insurance Company, a corporation, as principals, and Fireman's Fund Indemnity Company, as surety, are held and firmly bound unto the above-named J. J. O'Leary, Deputy Commissioner, 14th Compensation District, under the Longshoremen's & Harbor Workers' Compensation Act, Defendant, in the sum of

\$250.00; to which payment well and truly to be made, we bind ourselves jointly and severally, our heirs, executors, successors, and assigns, respectively, firmly by these presents.

Sealed with our seals and dated this 31st day of July, 1951.

Whereas, the plaintiff, Western Boat Building Company, a partnership, and United Pacific Insurance Company, a corporation, have prosecuted their appeal to the United States Court of Appeals for the Ninth Circuit to reverse the order entered in said cause, by the United States District Court for the District of Washington, Southern Division, on the 18th of July, 1951, dismissing the plaintiffs' petition for injunction in the above matter.

Now, therefore, the condition of this obligation is such, that if the above-named plaintiffs shall prosecute their appeal to effect and answer all costs if the said plaintiffs fail to make good their plea, then this obligation to be void, otherwise in full force and virtue.

WESTERN BOAT BUILDING COMPANY, a
Partnership, and UNITED PACIFIC IN-
SURANCE COMPANY, a Corporation,

By BOGLE, BOGLE & GATES,
Their Attorneys, Principals.

[Seal]

FIREMAN'S FUND
INDEMNITY COMPANY,

By /s/ CASSIUS E. GATES,
Its Attorney in Fact,
Surety.

Receipt of copy acknowledged.

[Endorsed]: Filed August 7, 1951.

U. S. Department of Labor
Bureau of Employees' Compensation

Before: J. J. O'Leary, Deputy Commissioner,
Fourteenth Compensation District.

Case No. 217-21

ROBERT MARKOVICH,

Claimant,

against

WESTERN BOAT BUILDING CO.,

Employer,

UNITED PACIFIC INSURANCE CO.,

Carrier.

TRANSCRIPT OF TESTIMONY
AT HEARING

Pursuant to notice, this matter was heard before J. J. O'Leary, Deputy Commissioner, U. S. Dept. of Labor, Bureau of Employees' Compensation, at Tacoma, Washington, on February 26, 1951, at 11:00 o'clock a.m.

Appearances:

BURTON W. LYON, ESQ.,

Appearing for the Claimant.

EDW. S. FRANKLIN, ESQ.,

Of Bogle, Bogle & Gates,

Appearing for the Employer and Carrier.

PROCEEDINGS

The Commissioner: If you are ready, we will start at this time.

This hearing is upon my own initiative, under authority of Subdivision H of Section 14 of the Longshore & Harbor Workers' Compensation Act, it following the filing of a claim for compensation by Robert Markovich for disability and loss of time from work, in consequence of injury sustained by him on October 18, 1950, while employed as a fastener by the Western Boat Building Company at Tacoma.

It appears from the papers already on file, that on said date claimant was engaged in work incidental to the repair of the tug El Sol which was, at the time, on a marine railway in the yard of the employer.

In his claim for compensation, Mr. Markovich alleges that while he was engaged in removing ration tanks from a lifeboat aboard the tug El Sol, while walking around the outer side of the lifeboat, he lost his balance and fell a distance of forty feet; in consequence of which he suffered fracture of three vertebrae in his spine, and the fracture of two ribs.

He apparently has been disabled from the time of the injury up to the present time, and no compensation has been paid by the United Pacific Insurance Company, the carrier insuring the liability of the employer, for compensation under the Longshoremen's and Harbor Workers' Compensation Act, but it appears from [2*] information furnished by the insuring carrier, United Pacific Insurance Company, that the Department of Labor & Industries of the State of Washington has been making payment of compensation to the claimant, and has assumed responsibility for his medical treatment.

Now, Mr. Franklin, on what grounds is this claim resisted?

Mr. Franklin: Upon the ground, Mr. O'Leary, that the injuries to Mr. Markovich are not subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, but are subject to the provisions of the Workmen's Compensation Act of the State of Washington.

The Commissioner: Mr. Lyon, will you state your position in respect to this matter?

Mr. Lyon: Our position is that the injuries occurred at a time when Mr. Markovich was employed in performing work within the scope of the Longshoremen's and Harbor Workers' Compensation Act; that the payments which have been made were voluntary payments made by the State of Washington; and that Mr. Markovich had made no election to receive compensation thereto; that the employer carries liability insurance to protect

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

the employees engaged in their sort of work, and which the employee was performing at the time the injury occurred.

That the ship upon which the employee was performing repairs, at the time of the injuries was still in commission; that it was situated on a marine railway, which was partially [3] submerged in the water at times of high tide; that the crew—some of the crew—was present and on board the boat at the time the injuries occurred.

I think that, in substance, is our position.

The Commissioner: Well, I think we will have Mr. Markovich come up here.

ROBERT MARKOVICH

was called as a witness on behalf of the Claimant, and having been first duly sworn, was examined and testified as follows:

The Commissioner: Will you state your full name and home address, please?

The Witness: My present home?

The Commissioner: Yes.

The Witness: Or at the time of the accident?

The Commissioner: Where do you live now?

The Witness: 3822 South Asotin.

The Commissioner: All right, Mr. Lyon, you may proceed.

Direct Examination

By Mr. Lyon:

Q. You are living with your daughter and son-in-law at the present time? A. Yes.

Q. How old are you at this time?

(Testimony of Robert Markovich.)

A. Fifty-eight.

Q. How old were you at the time the injuries occurred? Were [4] you 58 then?

A. That would be in August. I will be 59 in August.

Q. What date? A. The 12th of August.

Q. What is your marital status? You are a widower? A. Yes.

Q. When was your wife deceased?

A. On the 26th of September.

Q. Of 1950? A. Yes.

Q. You have, in the past, been employed by Western Boat Building Company? A. Yes.

Q. Here in Tacoma, Washington?

A. Yes.

Q. How long have you been thus employed by them? A. Somewhere around 14 years.

Q. About 14 years?

A. Something like that.

Q. What is your usual occupation in connection with working for the Western Boat Building Co.?

A. Well, fastener—that is what I do most of the time. I do do the fastening.

Q. Will you describe, very briefly, the nature of those duties, Mr. Markovich? [5]

A. Well, whenever there is anything to be planked around the boat, I drill the holes for the bolts, and anything to be fastened—such things as that.

Q. Have you thus been rated or classified during the course of your employment with this com-

(Testimony of Robert Markovich.)

pany? Has that been your principal classification?

A. Yes.

Q. In the ordinary course of your duties as a fastener, would you have occasion to go out on boats that were in the stream, or in navigable waters?

A. Yes.

Q. And you have done that frequently?

A. Yes, we go anywhere we are ordered to go—when the boat is on the water. We do a lot of repair work on the boats that are tied up at the dock. If there is any work to be done, we have to go down there and do it.

Q. And in the ordinary course of your work, you work on ships on the water—for example, on the marine railway?

A. Yes. Or else on the other ways.

Q. On the ways? Being constructed?

A. Yes.

Q. Calling your attention particularly to the tug boat *El Sol*, where was this tugboat situated when you were working on it?

A. It was on the marine ways, that is, on the farther side. I don't know whether you would call it—that was on the [6] ways—marine ways No. 1.

Q. Where is that situated?

A. In the yard there.

Q. Well, I mean, just for the purpose of the record, whereabouts in Tacoma is that situated?

A. Here in Tacoma.

Q. The street number?

A. On East 11th street.

(Testimony of Robert Markovich.)

Q. And this marine railway you speak of—does this railway run down into the water?

A. Oh, yes.

Q. Do you know how far out it runs into the water?

A. Oh, I should judge about a hundred—hundred and fifty feet.

Q. And this tugboat *El Sol* had been placed on a cradle, and had it been taken up out of the water?

A. Yes.

Q. It was standing on the marine railway at the time you were working on it?

A. Yes.

Q. Do you know how far up on the end of the railway it had been drawn up? Do you have any idea how far up?

A. How far up?

Q. Yes, from the end of the railway—how far had it been drawn up. I am speaking of the end that runs down into the water, Mr. Markovich? [7]

A. I don't know. I can't answer that.

Q. You don't know, then?

A. It was quite a ways. It was pulled out so that we was able to work around the boat, so that—well, so it lay in a straight place so we could work all around the boat when the tide came in—the high tide.

Q. When the high tide came in, would part of the keel still be in the water?

A. Part would be.

Q. Do you know how long the boat had thus been up on the railway?

A. I don't think it had been there very long—few days, or about a week.

Q. Do you know whether or not any of the ship's crew were present on the boat? Working there at the same time that you were?

A. I am pretty sure that all of them was there. They was cooking and eating on the boat—sleeping there, too.

Q. The men attached to the boat were cooking meals, eating, and living on the boat?

A. Yes.

Q. How long had you been working on this boat?

A. Well, I didn't work on it very long. I think that was the first day I worked on it.

Q. What were you doing? [8]

A. Well, we was going to take some ration boxes out of the lifeboats. That is, they was leaking, and they was supposed to be taken out and taken to the shop for welding.

Q. At whose direction?

A. Mr. Petrich—Martin A. Petrich.

Q. He personally told you what to do?

A. Yes, to go there, yes.

Q. What part of this boat were you working on, immediately preceding your injury?

A. I don't remember. I remember Mr. Petrich told me to go up there to take those tanks out, but I don't remember what I was supposed to do before that.

Q. Were you engaged in getting out these tanks at the time?

(Testimony of Robert Markovich.)

A. Yes. I was to go up there to get them out. Mr. Petrich told me to go up there to get them out, and I went up there.

Q. You went up on top of the boat?

A. Yes.

Q. Were you walking around there at the time you fell?

A. The fellow was there working already, and he couldn't jar them loose.

Q. Who is this man you are referring to?

A. Well, he couldn't jar it loose, and I said, "By gosh, I know a way to get them out," and so I went around the boat—outside of the boat and got around where the tank was, and I put my weight on it and jerked a couple of times, and it came [9] loose, and on my way back, I turned around and started to walk back—there was a space there to walk on——

Q. About how wide?

A. Eight or ten inches. And I went on and I see a doggone board that was on there, partly covered up by the canvas, and I thought it was solid, and by golly, it was loose. And that is all I know.

Q. How far did you fall?

A. I should judge, about forty feet. I don't know exactly how far.

Q. What did you fall on to?

A. Well, I know I hit the scaffold, and a good thing I did or I wouldn't be alive today if I didn't. I know when I hit the scaffold, my ribs caved in—

(Testimony of Robert Markovich.)

I could feel them go down, but how I landed down when I hit, by gosh, I don't know how I landed.

Q. Did you land partially in the water?

A. Yes. It was tide—the tide was going out, but there was still water in there.

Q. While you were lying there, did anything happen to you? A. Yes.

Q. Did any water come off the ship on you?

A. Oh, yes. The crew—I guess they was having their afternoon coffee, and all of a sudden, I felt water come—splash—all over me—out of the sink. [10]

Q. Out of the ship's sink?

A. Out of the drain pipe.

Q. Ran all over you while you were lying there?

A. Yes.

Q. You were treated, were you not, by a Dr. Petersen, here in Tacoma? Would that be Dr. Wendell Petersen?

A. Yes. Well, he is in partnership with Dr. Allison—Allison and Petersen.

Q. Can you state, just generally, and in lay language, your understanding of the nature of the injuries you sustained?

A. Well, the doctor—in that report, it says that in the doctor's report.

Q. Yes, it is there, but I was just wondering if you understood the nature of your injuries?

The Commissioner: I think it might be well, perhaps, if we confined ourselves to the medical report, Mr. Lyon.

(Testimony of Robert Markovich.)

Mr. Lyon: I think that, generally, covers the incidents leading up to your injuries. I might ask you one more thing, however.

Q. (By Mr. Lyon): Have you ever made any application for compensation under the Washington Industrial Compensation Laws?

A. Well, I don't think so. The only one that came to the hospital was Mr. Livermore from the Longshoremen's Compensation Act.

Q. But, as far as you know, as to the Washington Industrial [11] Act, have you ever made any application under that?

A. Not as far as I know. But I wasn't getting any money from anybody and I was kind of short. I was in debt—my wife had passed away—and I called up the union and told them I wasn't getting any money for compensation and that I should get some compensation from somewhere, and he said, "doggone, it you should, regardless of who takes the case. You should have your monthly payments, anyway." So they make it out and find who is going to take it over, and I received three checks from them—from the State, and the last one, I had a notice of the discontinuance.

Q. Do you know who made the application?

A. I don't know.

Q. You don't? A. No.

Mr. Franklin: I will object to that, as leading.

Q. (By Mr. Lyon): Well, did you, personally, make any application?

A. I don't think I have to my knowledge, no.

Mr. Lyon: I think that is all.

(Testimony of Robert Markovich.)

The Commissioner: Have you done any work since the injury?

The Witness: No, sir. I will be lucky if I do any work for quite a while.

The Commissioner: Are you under the care of a doctor?

The Witness: Yes, sir. [12]

Mr. Lyon: You are still in a brace?

The Witness: Yes.

The Commissioner: You still wear a brace?

The Witness: And a complete cast, yes.

The Commissioner: All right, Mr. Franklin, you may inquire?

Cross-Examination

By Mr. Franklin:

Q. Didn't you file a claim with the Department of Labor and Industries on October 22, 1950?

A. Well, I don't think I have. I don't remember if I did.

Q. In any event, you received three payments of compensation? A. Yes, that is right.

Q. And you didn't return any of them?

A. No, sir.

Q. Did you pay your hospital bill? A. No.

Q. Did the State pay that?

A. That I don't know.

Q. They paid your doctor's bill?

A. That I don't know. I know I didn't pay it.

Q. Mr. Markovich, what time of day did the accident happen?

(Testimony of Robert Markovich.)

A. Well, it must have been about 3:00 o'clock, maybe a little bit later.

Q. Three o'clock in the afternoon?

A. Yes. [13]

Q. And at the time the tug *El Sol* was on a cradle, resting on the beach?

A. No, it wasn't resting on the beach—it was resting on the marine ways—on the blocks.

Q. First, under the ship was a cradle?

A. Yes.

Q. And the cradle ran on iron rails—a railroad track? A. Yes.

Q. And the ship had been pulled out of the water and was laying or resting on the land at the time you were working on it? A. Resting on the land?

Q. Yes.

A. No, it was resting on the marine ways.

Q. And the marine ways was on the land?

A. Well, if you call it that.

Q. I see. Now, could you indicate on any of these pictures, approximately where you fell?

A. There is no boat in there.

Q. There is no boat there, but these photographs——

Mr. Lyon: Just a minute. These do not represent the situation at the time of the accident, and I don't believe it would be proper evidence. I don't believe it would give the proper picture of the situation at the time the injury occurred, and it would be misleading and entirely irrelevant. [14]

The Commissioner: Since the picture does not

(Testimony of Robert Markovich.)

depict the position of the tug as it was at the time of the injury, I will sustain the objection. However, if you can give us some idea as to where you fell, with respect to the marine railway, then it may be of some help to us, but if you don't feel you can, from these pictures, you need not attempt to do so.

The Witness: If I did, I wouldn't say it right, so I won't do it. I could probably go down and show you.

Mr. Lyon: I think that might be more informative.

The Commissioner: That might more clear than attempting to fix the exact location from photographs.

Mr. Lyon: I think it would be prejudicial to this man——

Mr. Franklin: Well, he worked there for fourteen years, and it seems to me he should be able to show—to point out where he fell.

Q. (By Mr. Franklin): Do you recognize any of these pictures? Can you tell us what these pictures are—of what place?

A. Yes, I can see this sawmill on the side.

Q. Are these pictures of the marine railway down at the Western Boat Building Company?

A. Yes.

Mr. Franklin: That is all. Thank you.

The Commissioner: Just one last question. How long was the El Sol?

(Testimony of Robert Markovich.)

The Witness: That must be—I didn't measure it. [15]

Q. (By Mr. Franklin): Where were you standing at the time of this accident? A. Where?

Q. Were you standing amidships, or athwartship, or aft? A. About midship.

Q. About amidships. In other words, about half the distance of the ship, were you?

A. Just about.

Q. And when you fell, what did you land in?

A. I don't know. I don't know where I landed.

Q. Did you land on some rocks?

A. I hear somebody hollering——

Q. On what did you land?

A. I hear somebody hollering, "Pull him out of the water."

Q. Do you know what you landed in?

A. No.

Q. You don't know whether you landed on some rocks, on the boat, or what? A. I don't know.

Mr. Franklin: That is all, I think.

The Witness: There is some fellows that know about it better than I do. I probably lost my senses at the time, and I didn't know.

The Commissioner: Mr. Markovich, have you ever seen any vessel being placed on the marine railway? [16]

The Witness: Yes.

The Commissioner: Would you be kind enough to give me some idea as to its operation? How it is done, so that we will have a better picture?

(Testimony of Robert Markovich.)

The Witness: When they want to put a boat on the drydock, they have got their, they have got their cradle and they shove the boat in the water so that it is on the cradle—in line with the cradle on the marine ways.

The Commissioner: How is the boat put into this position? Is it brought up bow first?

The Witness: Yes.

The Commissioner: How is it placed on the marine ways?

The Witness: It has got to be shoved way down in the water so that the boat can get right—set on it right.

The Commissioner: What has to be shoved into the water? The railway?

The Witness: Then, when the boat sits right in the middle, they start the boat—they start pulling it up.

The Commissioner: Is there a line attached to the bow?

The Witness: No, not right away—until they find out how the boat is secured and it is lined up on the ways, and until the buttocks are propped up so that it will stay there the right way—then they pull it out on the railway as far as they can, so that the men can work on it. [17]

Redirect Examination

By Mr. Lyon:

Q. One additional question I would like to direct to you, Mr. Markovich. What rate of compensation

(Testimony of Robert Markovich.)

were you receiving at the time of this accident?

A. \$13.60.

Q. Does that sound right to you.

A. That is pretty close.

Q. That is on the repair work? A. Yes.

Q. How long have you been receiving that?

A. Well, I received that when we work on the railway—all the time.

Q. That is your regular wage? A. Yes.

Q. What do you receive when not working on the railway? A. We receive less.

Q. How much less?

A. It runs 12c an hour less, 96c a day less.

Q. You would receive 12c an hour less if you are working on new construction? A. Yes.

The Commissioner: Had you been working more or less steadily, prior to the date of your injury?

The Witness: Yes.

The Commissioner: Do you know how much you made for the [18] year immediately before you were hurt? Or do you know how much you would average per year?

The Witness: We get a yearly statement.

The Commissioner: What were your earnings from 1950——

The Witness: I was off quite a lot from work. I think it was \$2400 and some odd dollars.

The Commissioner: Do you have any information for the year prior to the injury, Mr. Franklin?

Mr. Franklin (to Mr. Stangland): Would you

(Testimony of Robert Markovich.)

furnish us with the figures for the year previous to the accident?

Mr. Stangland: Yes.

The Commissioner: From October, 1949, to October, 1950, if you will.

Mr. Stangland: Yes, sir.

The Commissioner: Mr. Franklin, will you stipulate that the claimant is presently disabled?

Mr. Franklin: Yes.

The Commissioner: And that it appears from his present condition his disability will extend into the future?

Mr. Franklin: Yes, sir.

The Commissioner: Anything further?

(No response.)

The Commissioner: You may step back, Mr Markovich.

(Witness excused.)

The Commissioner: Call your next witness. [19]

VERN W. STANGLAND

was called as a witness on behalf of the claimant, and having been first duly sworn, was examined and testified as follows:

The Commissioner: Please state your name?

The Witness: Vern W. Stangland, 2018 4th St. N. E., Puyallup, Wash.

(Testimony of Vern W. Stangland.)

Direct Examination

By Mr. Lyon:

Q. What is your connection, if any, with the Western Boat Building Company?

A. I am the bookkeeper.

Q. How long have you been employed thus?

A. Four and three-quarters years.

Q. Do you know, of your own knowledge, whether Western Boat Building Company carry any liability insurance under the terms, provisions and requirements of the Longshoremen's and Harbor Workers' Compensation Act?

A. Yes, they do.

Q. Do you know, of your own knowledge, how many employees are thus covered?

A. All the workers in the yard, including the office.

Q. All yard workers and office workers?

A. Yes.

Q. Have they thus been covered during the entire period of your employment by Western Boat Building Company? [19-A]

A. The office wasn't covered, except at the last. The policy started in January—January 1, 1951.

Q. What about the other workers in the yard?

A. The men in the yard here?

Q. At all times, since you have been in the employ?

A. Oh, including offshore work?

Q. This phrase, "including offshore work"—does the policy expressly state "offshore work," or

(Testimony of Vern W. Stangland.)

does it make any relation, or does it relate itself to the liability under the terms of the Federal Longshoremen's and Harbor Workers' Compensation Act?

A. I don't know the exact wording of it.

Q. You don't know the exact wording on the policy? A. No.

Q. So that your earlier answer as to any off-shore work may or may not be in accordance with the expressed terms of the policy?

A. That is correct.

Q. Do you have any idea, offhand, how much of Mr. Markovich's time during the year 1950; I am speaking only approximately—I understand you can't get it with any particular degree of accuracy—approximately how much of his time was spent in the type of work for which he received a daily rate of \$13.60? And how much was spent in the less hazardous activities, for which he received 12c per hour less compensation? [20]

A. I can't give you an exact answer.

Q. Could you give us an approximation?

A. Well, without looking at his record, no. Because we have so many different kinds of work. In other words, we will have a new boat on the ways down at Plant 2—we had one before the fire—and if he was working on that, it would be under one category. We have an awful lot of repair work during the year, and unless I saw the records, I couldn't give you an exact answer, and I would hate to estimate it, because I might make an awfully bad guess.

(Testimony of Vern W. Stangland.)

Q. Were you present at the time this injury occurred? A. I was in the office.

Q. Did you go out after the accident?

A. Out on the back porch overlooking the boat, although I couldn't see for the boat was in line with where he was laying. I didn't go down there.

Q. You didn't see him at the time the injury occurred? A. No.

Q. You had known about it? A. Yes.

Q. Can you tell us whether the water, at high tide, comes as far as to cover the keel of the boat El Sol, where it was placed on the marine railway at the time of the accident?

A. I would say, partially so.

Q. The bottom of the boat would be partially covered by [21] water. A. Yes.

Q. During the period of high tide?

A. Yes.

Q. Do you know about how long this boat had been on the marine railway?

A. Not exactly, but I would estimate two to four days.

Q. Do you know, yourself, whether the members of the ship's crew were present at the time of the accident? A. They were on board.

Q. The ship was in commission? A. Yes.

Q. How much longer did the ship remain for repair, if you know?

A. I think they were practically completed, and I believe the boat was at the dock the following day.

(Testimony of Vern W. Stangland.)

I may be wrong on that, but I have got the records down at the plant, on the docking of the vessel.

Q. But to the best of your recollection, it was returned to the water next day?

A. The next day, or the following day. I am not sure on that point. But we keep complete records on the docking of all boats.

Q. Was there any time, commencing with the time the boat was run up on the marine ways until the time it was returned to the water—in that interval, that there were not, ordinarily [22] and usually, members of the crew present and working on it?

A. Not to my knowledge.

Q. For the sake of the record, and because I am not too sure—I am not too clear on it, I am going to again inquire what his daily rate is?

A. Mr. Markovich's rate was 13.60.

Q. That is for an eight hour day?

A. Yes.

Q. Then there was a rate of compensation which was different from the compensation he received during repair work, and that was on work on new construction?

A. That is true.

Q. How much less was the rate on new construction?

A. 12c per hour less.

Q. To the best of your recollection, it would be 12c less per hour?

A. Right.

The Commissioner: Do you have any idea of the tonnage of the Tug El Sol?

The Witness: I have the records at the plant.

The Commissioner: Well, just approximately.

The Witness: I can give you the approximate length—it is 136 feet.

The Commissioner: Approximately 136 feet?

The Witness: Yes. [23]

The Commissioner: I just wanted to make sure it was over eighteen tons.

The Witness: I would say it was better than 200 tons.

The Commissioner: Do you have any questions, Mr. Franklin?

Cross-Examination

By Mr. Franklin:

Q. Mr. Stangland, can you identify those pictures and state what they are?

A. These are pictures of our marine ways No. 1 and No. 2.

Mr. Lyon: I don't know how important this is, but I don't think it is proper cross-examination. And at least for the record, I am going to make an objection.

Mr. Franklin: If you want, I will put Mr. Stangland on later.

Mr. Lyon: I think it would probably be allowable for you to ask questions of your own witness, whereas now, on cross-examination, they would not be proper.

The Commissioner: I think you had better hold that point in abeyance. Are you calling his witness as your own?

Mr. Franklin: When he rests.

The Commissioner: Are you resting?

Mr. Lyon: I have.

The Commissioner: Do either of you gentlemen have the medical report in his possession? That might give us——

Mr. Franklin: There is a certified copy of it in the [24] claim file.

The Commissioner: Are you going to make that available?

Mr. Franklin: Yes.

KARL KOCH

called as a witness on behalf of the claimant, and having been first duly sworn, was examined and testified as follows:

The Commissioner: Will you state your full name and address for the record?

The Witness: Karl Koch, K-a-r-l K-o-c-h.

Direct Examination

By Mr. Lyon:

Q. Mr. Koch, you are employed at the Western Boat Building Company? A. Yes.

Q. How long have you been thus employed?

A. About eight years.

Q. Has Mr. Markovich been working for the same company during all the time you were employed there? A. He did.

Q. What classification do you have, if you have any there as an employee? What do they call your type of work? A. They call us fasteners.

Q. You are a fastener, also? A. Yes.

Q. And were you working on the tug El Sol at

(Testimony of Karl Koch.)

the date [25] when Mr. Markovich sustained his injuries? A. Yes.

Q. Did you see Mr. Markovich fall at the time?

A. No. I didn't see him fall, but I heard a noise and I went over and he was laying down in the water.

Q. And for the Commissioner here, will you tell whereabouts he was lying? In how much water?

A. It was about a foot of water, because I had to go into the water and turn him around to get him on dry land. I just pulled him out of the water and picked him up, and he complained about his back, and I laid him on a piece of plywood and left him there until the ambulance got there.

Q. That is about all you know about the accident? A. I didn't see him fall.

Mr. Lyon: That is all. Thank you.

Mr. Franklin: No questions.

The Commissioner: You are excused.

(Witness excused.)

The Commissioner: Have you anything further?

Mr. Lyon: I think I would like to ask Mr. Koch one further question.

The Commissioner: All right. Mr. Koch, you may remain where you are.

Q. (By Mr. Lyon): Do you have to go out and work on boats out in the stream, as well as on the marine ways? [26] A. Yes.

Q. Do you do that frequently?

A. Well, when the boat is out there for repair, we have to go out to it.

(Testimony of Karl Koch.)

Q. Has Mr. Markovich ever done that, to your knowledge? A. Yes.

Q. On frequent occasions?

A. It all depends. If the work can be done on the water, they don't bring the boat in, but if it is something underneath the boat, they pull it out of the water. Such as when a boat is to be painted, or the hull repaired; then they bring it out of the water.

Q. Were repairs being made to this boat El Sol? A. Yes.

Q. Were you engaged in working on that?

A. Yes, such as taking the zinc plates off.

Mr. Lyon: I think that constitutes all the evidence I was going to introduce. I understood we were going to stipulate as to the other matters, such as the medical.

The Commissioner: That will be stipulated to. Mr. Franklin, I believe you wanted to put Mr. Stangland on as your own witness?

VERN W. STANGLAND

was called as a witness on behalf of the Employer & Carrier, and having been first duly sworn, was examined and testified as follows: [27]

Direct Examination

By Mr. Franklin:

Q. You have been employed there for how many years? A. Four and three-quarters years.

Q. You are entirely familiar with their plant?

(Testimony of Vern W. Stangland.)

A. Yes.

Q. I want to hand you this photograph marked Exhibit No. 1 and ask you to identify it.

A. Yes, this is the marine ways No. 1.

The Commissioner: Mark that Employers Exhibit No. 1.

(Document referred to, being a 8x9 photograph, was marked for identification as Employer's Exhibit No. 1.)

Q. (By Mr. Franklin): Is that the scene of Mr. Markovich's accident? A. Yes.

Q. What is the next picture you have?

A. That is a side view of this—it is the Western Lumber Manufacturing Company, which is right next to it, and I believe, north of the boat ways.

Mr. Franklin: Could we have that marked as Employer's 2?

The Commissioner: It will be so marked.

(Photo referred to was marked Employer's Exhibit 2, for identification.)

Q. (By Mr. Franklin): What is Employer's 3?

A. That is another view of the marine [28] ways.

(Photo referred to was marked for identification as Employer's Exhibit No. 3.)

Q. What does Employer's Exhibit No. 3 show—what mechanism, particularly?

A. Well, it shows the marine rails down at the

(Testimony of Vern W. Stangland.)

bottom, and this is the drawing device for drawing boats up the rails and out of the water.

Q. Where are those marine rails placed?

A. What do you mean?

Q. Over what area are they placed?

A. On the ground.

Q. Would you say, the beach or the land?

A. Yes, that is right.

Q. How are they affixed to the land?

A. I think they are weighted down. They have these planks, and two rails in the center and two on the outside.

Q. They project out into the water, do they?

A. Oh, yes.

Q. What is the method by which the boat is pulled onto the land by means of the railroad?

A. The boat is brought into the main entrance way of the ways, or a little way out, as far as needed, and they bring the boat in over the top of the ways, and set the blocks so that the boat will not tip. They have an electric motor and a winch on this side, and they slowly bring the boat up on [29] the dry dock.

Q. You are referring to the cradle, on which the boat rests?

A. They pull the whole marine way up—it runs on a regular track, and the boat is pulled directly into the plant.

Q. What would you say would be the area of the beach, or of the land covered by the marine rails?

A. You mean, the length?

(Testimony of Vern W. Stangland.)

Q. Yes.

A. Well, I would imagine 150 feet, anyway. We can pick up and bring up on the railway a 150 foot boat.

Q. And where is the winch or device to pull the cradle up on the rails?

A. Back over here—underneath the shed.

Q. Back of the railway? Back on the land?

A. Oh, probably 30 feet above the chain box.

Q. Where does the boat rest, with reference to the water? After it is pulled up on the rails.

A. Well, the bottom end of the dock is always in the water, and I don't think of any time, especially at low tide, where it would be clear out of the water.

Q. Is the upper part of the cradle out of the water?

A. When the boat is docked, yes, sir. They can run it clear out into the water so that it is submerged on the lower part. [30]

Q. When a boat is pulled up on the rails—on the shore, or on the land, is it replaced in the water again until all work on it is completed?

A. They can either finish the boat completely in the dock, or haul it up for cleaning and painting the bottoms, replacing the zinc plates, repairing or replacing propellers—any underwater work that has to be done. Then, you can put it back in the water for completion of the work inside of the boat.

The Commissioner: Are you offering those in evidence?

Mr. Franklin: Yes, I am.

(Testimony of Vern W. Strangland.)

Cross-Examination

By Mr. Lyon:

Q. I want to question him about them. Do you know when these photographs were taken?

A. I wasn't there that day. I can't recollect.

Q. Was it before or after the accident?

A. This was after the accident.

Q. How long after?

A. I would say, anywhere from one to two weeks afterward. But that is just a guess. I don't know exactly.

Q. Does this show the same conditions existing, or approximately the same conditions as existed at the time of the accident?

A. Except for the boat being on the dock. I don't believe there was any change of any kind to the dock, itself. [31]

Q. How long would you say that tugboat was?

A. About 136 feet.

Q. How much of that carriage shown in the picture—how long is that carriage?

A. I think, about 150 feet. I don't have the exact dimensions and I may be wrong, but I think that I may be a little over or a little under on that.

Mr. Lyon: That is all.

The Commissioner: The three photographs marked for identification as Employers Exhibits Nos. 1, 2 and 3, will be received in evidence.

(Documents referred to, previously marked for identification as Emp. Nos. 1, 2 and 3, were received in evidence.)

Mr. Franklin: The employer desires to offer at this time, this certified copy of the claim filed by Mr. Markovich with the Department of Labor & Industries, being Claim No. B-811942.

Mr. Lyon: May I examine it, please.

(Counsel examines file.)

Mr. Lyon: I have no objection.

Mr. Franklin: The employer rests.

The Commissioner: The certified copy of the record of the Department of Labor & Industries of the State of Washington, Claim File No. B-811942, will be received in evidence and marked [32] as Employer's Exhibit No. 4

(File referred to above was marked for identification as Employer's Exhibit 4 and received in evidence.)

The Commissioner: Both sides rest?

Mr. Lyon: We do.

Mr. Franklin: Employer rests.

The Commissioner: The hearing will be concluded, and decision reserved.

(Whereupon, at 11:40 o'clock, a.m., February 26, 1951, the hearing was concluded.) [33]

EMPLOYER'S EXHIBIT No. 4

State of Washington,
County of Thurston—ss.

I, R. J. McLean do hereby certify that I am the duly appointed, qualified and acting Supervisor of Claims in the Department of Labor and Industries, and that the attached claim file being Claim No. B-811942 is a full, true and complete copy of the original claim file (medical treatment bills accepted) of Robert Markovich who was injured on October 18, 1950, while in the employ of Western Boat Building Company which said claim file has been under my exclusive supervision, control and custody.

/s/ R. J. McLEAN.

Subscribed and sworn to before me this 15th day of Feb., A.D. 1951, at Olympia, Washington.

[Seal] /s/ JAMES E. LOCKHART,
Notary Public in and for the State of Washington,
Residing at Olympia, Washington.

State of Washington
Department of Labor and Industries
Division of Industrial Insurance

SUMMARY OF INFORMATION AND PROCEEDINGS

Firm name	Western Boat Building Co.	Copy
Office address	P.O. Box 1114, Tacoma 1, Wash.	
Location where accident occurred	2505 E. 11th St., Tacoma, Wash.	
Claimant's name	Robert Markovich.	
Address last given	38220 S. Asotin, Tacoma, Wash.	
Claim No.	B-811942.	
Occupation	fastener.	Age 57.
Character of injury	—fracture, severe, 1st lumbar vertebra, mult. abras. cont. shoulder L. ribs.	
Wage:	Daily \$13.60; Hourly sw.	Date of injury 10-18-50.

Employer's Exhibit No. 4—(Continued)

Claimant's marital status widower. Date pay ceased same.

Number of dependent children none.

Previous claims: 4 T. L. Eff. 10/22.

Proceedings: Allowed Date Nov. 14, 1950.

That at the time of injury as alleged the workman named was
.....engaged in work within the jurisdiction of the Division of
Industrial Insurance.

That.....claim has been filed by or on behalf of said work-
man within one year after the day upon which the injury occurred.

That.....physician's report (medical proof) has been filed
as required by law.

That at time of injury the employer was (not) in default.....

(1) Monthly Payment: Pay 1 month, Oct. 22 to Nov. 22, 1950
\$75.00.

(2) Partial Payment:days.....to....., inc., 19....., \$.....

(3) Lump Sum Settlement Closing Claim:

Released 12-14-50 JS Protest 11-20-50 CA

Time loss, temporary total disability....days to...., inc., 19.....

Permanent partial disability.....

Date notice sent to employer Nov. 15, 1950. Warrant B610095.

Adjusted on Report.

Computed Nov. 14, 1950.

/s/ R. J. MURPHY,
Claim Adjuster.

Accident Fund	Awards	Amount	Computed	Date Approved	War- rant No.
2—12/22/50	75.00	/s/ R. J. Murphy	12/20/50	B616962	
3— 1/22/51	75.00	/s/ R. E. Simmonds	1/24/51	B621993	

M. A. Fund Awards

Savon Drugs Inc. RX, Amt. \$2.16; Computed /s/ Olsen; Date Ap-
proved Notice Sent Jan. 1, 1951.

Braleys Inc. RX, Amt. \$6.13; Computed /s/ Olsen; Date Ap-
proved Notice Sent Feb. 14, 1951.

LOYE

Name of
injured workman.....

Robert Markovich

Will this workman be kept on salary during his period of disability?

no

Construction ☐

Operation ☐

Has he any financial
interest in the business?

no

Repair ☐

On launched boat ☐
Sole owner?

Partner? Stockholder?

MEDICAL AID AWARDS

Amount Computed

Date Nettes
Sent

Warrant No.

Claim No. B811942

Firm No. 17093

Class 9-2

STATE OF WASHINGTON

REPORT OF ACCIDENT

Department of Labor and Industries

Name of injured workman..... Markovich, Mr. Robert

Address (to which all mail to be addressed)..... 3822 So. Asotin

Date of birth..... Yugoslavias Sex M Age 57

Height..... 5' 11 1/2 Weight..... 145

Date accident occurred..... Oct. - 18 - 1950 If you have returned to work give date..... State hour of accident..... 3 P.M.

Name of employer..... Western Boat Building Co.

Address..... E. 11th St.

Were you doing your regular work at time of accident? Yes

Describe the accident in full: After taking ration boxes from boat with difficulty, walking back held on to board which gave away, fell and couldn't remember for a short time

State nature and date of any previous injuries received by you. --

Have you filed claim with any other State Agency for this disability? no

How long have you worked for this employer? 15 years

Did you report this accident to your immediate supervisor? yes

If married, full name of wife or husband widower

Address, wife or husband

(Write "Same" if living together)

IF DIVORCED, DATE

NAME

Relationship

Date of Birth
Mo Day Year

NAME

Relationship

Date of Birth
Mo Day Year

49-10-13 B 339732-1-4-1-4 B 336734
Ruble B 51222-2-1-4-1-4 B 337014

I declare that the foregoing statements are true to the best of my knowledge and belief.

Signed..... 22 day of Oct. 1950, at Tacoma Washington.

IMPORTANT WORKMAN SIGN HERE /s/ Robert Markovich

Employer Must Complete This Report by Filing in and Signing Employer's Section Below. Then Mail Report at Once to Department of Labor and Industries, District Office. (See reverse side for address.)

Firm number of employer..... 17093

(Number assigned by Department of Labor and Industries)

Firm name of employer..... Western Boat Building Co.

Address..... P. O. 1114 Tacoma, Wash

Have the hours worked and wages paid this workman been included in the quarterly payrolls reported to this department? yes

In what class has this workman been included in the quarterly payrolls reported to this department? 9-2

If not included, give reason

How long has workman been employed by you? 15 yrs

Business of employer..... Boatbuilding Location of plant or place of work where accident occurred 2505 E. 11th St.,

(If engaged in construction work state particular kind)

Check in which department workman was employed? Construction ☐ Repair ☐ Operation ☐ On launched boat ☐

Name of injured workman Robert Markovich

Has he any financial interest in the business? no

Will this workman be kept on salary during this period of disability? no

Date and hour of accident 3:00 P.M. Last day worked Oct. 18-1950 Date returned to work yes

Was workman engaged in the regular course of his employment when injured? yes

Did accident occur on your premises? yes If not, where?

Date and hour accident reported to you 3:00 P.M. To whom reported M.A. Patrich, Jr., station. Partner

Do you oppose allowance of claim? Why? (Attach letter if necessary) No

How did accident happen? He walked to outside of lifeboat and so doing-grabbed hold of

lifeboat cover brace, which being removable, pulled out, causing him to lose balance and

fall --

(Describe the accident fully, stating whether the injured person fell or was struck, etc., and all the factors contributing to the accident. If necessary write a supplemental letter.)

I declare that the foregoing statements are true to the best of my knowledge and belief. Western Boat Building Co.

Signed this 27th day of Oct. 1950 Martin A. Patrich, Jr. By Partner

(Official position)

Employer's name Robert Markovich

Address 3822 So. Asotin

Workman's name Western Boat Bldg.

Date of accident 10/18/50

Home address E. 11th St., City

Date of first treatment 10/18/50

Diagnosis and description of injury in full Compression fracture, severe, 1st lumbar vertebra.

Multiple abrasions and contusions, shoulders, left ribs.

Do you believe present condition or disability is result of above injury? yes

Give treatment used Hospital & reduction

& cast.

Has he been treated for this condition previous to this accident? no

Is there any evidence of pre-existing constitutional disease present which may retard recovery? no

Name and address of hospital to which patient was taken Tacoma General Hospital

Will injury cause loss of time 1 year

Describe any previous injury received by patient --

This report can be accepted only when signed by a licensed physician.

I declare that the foregoing statements are true to the best of my knowledge and belief.

Signed

Address

Date

/s/ Wendell G. Peterson, MD

1422 Montway Bldg.

Tacoma 2, Washington

October 22, 1950

Memo by Claim Agent:

Allowed By

R.M. Adj.

X-RAY FINDINGS X-RAYS Positive For fracture (Strike one)

Employer's Exhibit No. 4—(Continued)

(Copy)

November 15, 1950

Mr. Robert Markovisch,
3822 South Asotin,
Tacoma, Washington.

Re: B-811942

Dear Mr. Markovisch:

In regards to a phone call this morning from your daughter pertaining to your recent injury. The claim has been allowed by this Department and one month's time loss will be mailed to you November 22, 1950.

Very truly yours,

SUPERVISOR OF INDUS-
TRIAL INSURANCE,

By H. WILLIAMS,
Adjudicating Claims
Examiner.

HW/jac

Employer's Exhibit No. 4—(Continued)

State of Washington, Department of Labor and
Industries Claim Adjuster's Report

Copy

Claim No. B 811942

Date November 22, 1950

To

Attention

Herewith file, claim of: Robert Markovich.

Address: 3822 S. Asotin, Tacoma, Washington.

Assignment: Refer to R. J. McLean, Supvr. of
Claims assignment dated 11-22-50.

X-rays 0

By

(This assignment to be completed within ten days.)

DEPARTMENT OF LABOR
AND INDUSTRIES

Tacoma Branch Office

November 28, 1950

(Complete file attached)

Attention: R. J. McLean,
Supervisor of Claims.

Re: Claim No. B 811942, Robert Markovich,
3822 S. Asotin, Tacoma, Washington.

After investigating the accident to Robert Markovich at the Western Boat Building Company on October 18, 1950, I find it happened as reported on claim slip, and the boat El Sol was still in commission with the crew working days.

The boat was on the marine ways at the Company

Employer's Exhibit No. 4—(Continued)

plant at E. 11th Str., Tacoma. In my opinion, this is a case for the Harbor Worker's Compensation as we have no jurisdiction over boats in commission.

/s/ J. E. DOYLE,
Inspector.

JED:ca
attach

Received December 1, 1950.

U. S. Department of Labor
Bureau of Employees' Compensation
Longshoremen's and Harbor Workers'
Compensation Act
Fourteenth Compensation District
Room 604, 905 Second Avenue Building
Seattle 4, Washington

Copy November 17, 1950

Address Replies to:

The Deputy Commissioner

Refer to File No.

F. J. Graham, Vice President,

United Pacific Insurance Co.

Medical Arts Bldg.,

Tacoma 1, Wash.

Re: Robert Markovich, 217-21, Western Boat
Building Co.

Injured: October 18, 1950. Your File
WC 22-11610.

Dear Mr. Graham:

I have your letter of November 16, 1950, relative

Employer's Exhibit No. 4—(Continued)

to the case of Robert Markovich, who is reported to have sustained an injury on October 18, 1950, while engaged in work incidental to the repair of the vessel "El Sol" which apparently was on a marine railway at the yard of the Western Boat Building Company, Tacoma, Washington.

In your letter you state that in view of the holding of the Washington Supreme Court in the case of Rohlfs vs. Department of Labor and Industries, 190 Wash, 566 (69 Pac. 2d 817), you believe that the Department of Labor and Industries has jurisdiction of this claim and understand, the Department will assume responsibility for medical bills as well as compensation.

In this connection I should like to point out to you that the Bureau has consistently taken the position that in view of the purposes for which a marine railway is constructed and used, it is clear that a marine railway is a "dry dock" within the meaning of that term as used in the Longshoremen's and Harbor Workers' Compensation Act, and that injuries sustained in connection with the repair of a completed vessel engaged in commerce and navigation, while said vessel is on a marine railway, are covered by the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

I am therefore unable to agree with your belief

Employer's Exhibit No. 4—(Continued)

that the Department of Labor and Industries has jurisdiction in this matter.

Very truly yours,

/s/ J. J. O'LEARY,

Deputy Commissioner.

cc: Dept. of Labor & Industries.

Received November 20, 1950.

November 22, 1950

(Copy)

Peter Pete,
Tacoma Office,
421 Perkins Bldg.,
Tacoma, Wash.

Re: Claim No. B-811942, Robert Markovich.

Dear Mr. Pete:

We are attaching the record in the above case and direct your attention to the letter of November 17th, by Mr. O'Leary, Deputy Commissioner of the Longshoremen's and Harbor Workers' Compensation Act.

Will you please investigate this case and supply us with all of the facts. Was the vessel on which this man was working in commission as an instrument of navigation and commerce and where was it located while the work was being done? Did the

Employer's Exhibit No. 4—(Continued)

accident occur aboard ship or was this man on the dock at the time he was hurt?

Very truly yours,

SUPERVISOR OF
INDUSTRIAL INSURANCE,

.....,

R. J. McLean,

Supervisor of Claims.

RJMcL:bp

(Copy)

December 1, 1950

Peter Pete,

Tacoma Office,

421 Perkins Building,

Tacoma, Wash.

Re: Claim No. B-811942, Robert Markovich.

Dear Mr. Pete:

On November 22nd, we sent you the above numbered record and asked that an investigation be made. Will you please expedite the investigation as much as possible, as we are being pressed for a decision in the matter.

Very truly yours,

SUPERVISOR OF
INDUSTRIAL INSURANCE,

.....,

R. J. McLean,

Supervisor of Claims.

RJMcL:bp

cc to Mr. E. S. Franklin, c/o Bogle, Bogle & Gates,
6th Floor, Central Bldg., Seattle 4, Wash.

Employer's Exhibit No. 4—(Continued)

Department of Labor and Industries
Interoffice Communication

(Copy)

Date: December 4, 1950

To: R. J. McLean, Supvr. of Claims.

From: Peter Pete, District Supervisor.

Office: Tacoma.

Subject: Re: Claim No. B 811942, Robert Markovich, 3822 So. Asotin, Tacoma, Washington.

Referring to your letter of December 1, 1950, re the above named claimant, please be advised that this claim together with investigation made by Safety Inspector John Doyle was sent to Olympia on November 30, 1950, and no doubt is now in your hands.

/s/ PETER PETE,

District Supervisor.

PP:ca

noted

HW

[Stamped]: December 6, 1950.

Received December 5, 1950.

Employer's Exhibit No. 4—(Continued)

Law Offices of
BOGLE, BOGLE & GATES
6th Floor Central Building
Seattle 4
Cable Address "Bogle Seattle"

November 28, 1950

(Copy)

Mr. R. J. McLean, Claim Agent,
Department of Labor & Industries,
Olympia, Washington.

Re: Claim No. B-811942, Robert Markovich.

Dear Sir: .

This will explain the writer's visit to Olympia yesterday in connection with the above case.

We represent United Pacific Insurance Company, carrier for Western Boat Building Company, under the Longshoremen & Harbor Workers' Act.

We understand that Mr. Markovich filed a claim for his injury of October 18th which occurred on land, while he was on a marine railway and that the Department allowed the claim and was preparing to issue a warrant to him for compensation. We have also been advised that Mr. J. J. O'Leary, Deputy Commissioner for the Longshoremen & Harbor Workers' Act, has written you that he regards this work as under the jurisdiction of his act.

We think that Mr. O'Leary is plainly mistaken in the matter. We think the case of *Rholfs v. Dept.*

Employer's Exhibit No. 4—(Continued)

of Labor & Industries, 190 Wash. 566, effectually disposes of his contention. This decision of our State Supreme Court is binding upon the Department and we assume that you plan to follow it.

The writer recalls that at the time of the Rholf's case, Mr. O'Leary's predecessor, Mr. Marshall, was making the same contention.

We are quite at a loss to understand the position of the officials of the Longshoremen & Harbor Workers' Act in interjecting themselves into this matter, especially upon plainly erroneous legal grounds. The following cases hold that a marine railway is not subject to the Longshoremen & Harbor Workers' Act but to the State Compensation Act:

Colonna Shipyard v. Lowe,

22 F. (2d) 853.

Norton v. Vesta Coal Co.,

63 F. (2d) 165.

The Vesta Coal Co. case was appealed to the United States Supreme Court by the attorney for the Longshoremen & Harbor Workers' Act, but the appeal was withdrawn in an order entered in the case, found in 291 U.S. 641, reading as follows:

"January 15, 1934. Per Curiam: As it appears that the government has not adopted the conclusion that the decision below is correct and no substantial controversy is presented at the bar

Employer's Exhibit No. 4—(Continued)

of this Court, the writ of Certiorari herein is dismissed.”

Consequently, we are at a loss to understand the position of Mr. O’Leary in the matter.

We further desire to advise you that since the Rholfs case all of the shipyards have paid premiums to the Department for work done on marine railways, and if this claim is not to be allowed, claims for refunds in substantial amounts would probably be made.

There is another reason why this claim must be allowed by the Department. This is because of the holding in *Davis v. Department of Labor & Industries* by the United States Supreme Court, holding that in any twilight zone of jurisdiction the State of Washington can constitutionally apply its Workmen’s Compensation Act.

We understand the file is now in Tacoma. We would appreciate very much if upon determining that the injury occurred on a marine railway on land you will order the prompt payment of this claim.

Thanking you for your cooperation, we are,

Very truly yours,

BOGLE, BOGLE & GATES,

By /s/ EDW. S. FRANKLIN,

Received November 29, 1950.

Employer's Exhibit No. 4—(Continued)

Department of Labor and Industries
Interoffice Communciation

(Copy)

Date: December 8, 1950

Ralph Brink*

To: John Shaughnessy, Supervisor Industrial Insurance.

From: Harry L. Parr, Assistant Attorney General.

Office: Olympia.

Subject: Robert Markovich—Claim No. B 811942.

The question is—whether or not a workman working on a ship, the ship being on a marine railroad, the marine railroad being a railroad that goes into the navigable stream but comes out on land, would come under the act.

Presumably, Mr. Markovich was working on the boat or ship, when it was upon the land end of the marine railroad. A pursual of the file, however, does not definitely fix the place of his work on the land portion of the marine railroad. This brief, however, is on the assumption that the place where he worked, on the marine railroad, was entirely on the land.

Comar v. Dept. 187 Wash. 99, the Supreme Court held "the locus of the injury was properly held decisive on the question to be determined and the

[*On original the name Ralph Brink appears over the name John Shaughnessy in longhand.]

Employer's Exhibit No. 4—(Continued)

case cited does not support appellant's contention in the Rohlfs' case."

Rohlfs v. Dept. 190 Wash. 586. In this case the boat had been completely lifted from the water and was standing upon a track at some distance from the shore (page 568).

[Between paragraphs in longhand]: Citator shows no change.

A marine railroad is not like a floating dock or a dry dock. A marine railroad is on the land, and being on the land is under state compensation act. If the injured workman was working on land and not on water the labor was "a matter of purely local concern, unconnected with navigation," and was essentially non-maritime in nature.

Maryland Casualty Company v. Lawson (1943) 100 Fed. (2nd) 733, holds to the contrary. The Longshoremen and Harbor Workers Compensation Act is found in Title 33, Section 901 and Section 902 recites the coverage with this exception, "and if recovery * * * may not validity be provided by state law."

[Longhand in foot margin]: Pay and follow.

M. L. 12/14/50.

[Longhand in foot margin]: Release warrant.

J. S. 12/14/50.

Employer's Exhibit No. 4—(Continued)

Mr. John Shaughnessy -2-

Dec. 8, 1950

Re: Robert Markovich,
Claim No. B 811942

Supporting the state position that the state law governs when the accident is on land are the following Federal cases:

1. Swanson vs. Marra Bros., 328 U. S. 1, 7.
2. Davis vs. Department Labor and Industries (1942), a late case where our Supreme Court held "benefits under state compensation acts may be claimed for accidents occurring on navigable waters of the U. S. when they happen in the course of a purely local operation unconnected with commerce and navigation."

That case was carried throughout different U. S. courts and finally to the Supreme Court of the U. S. which denied rehearing and reported in 317 U. S. 713. The action of the U. S. Supreme Court means that they were in accord with what the state court said and for that reason denied rehearing. The case of Davis vs. Department of Labor and Industries is found in 12 Wash (2nd) 349.

3. Royal Indemnity Company vs. Puerto Rico Cement Corp. (1944).

This cause was tried in the circuit court of appeals which said:

The clause in the Longshoremen and Harbor Workers' Compensation Act, "may not validly be provided by state law," limits the maritime field

Employer's Exhibit No. 4—(Continued)

of this chapter. The U. S. Supreme Court denied rehearing of the case in 223 U. S. 756.

It would seem that if Robert Markovich was working on a boat on land that he would be under the State Act.

/s/ HARRY L. PARR.

HLP:pm

2 pages

State of Washington
Department of Labor and Industries
Olympia

Please Comply With the Following Where
Checked and Return the Bill to This Office.

1. Affix personal signature.
2. Submit bill on enclosed form.
3. Attach hospital operative record—laboratory reports.
4. Submit x-rays to confirm diagnosis and/or to complete the file.
5. List x-ray findings on bill.
6. Bill should be signed by attending physician as shown by the records.
7. Please specify exact treatment given on dates listed.
8. Attach copies of the prescription charged for. (Copy also required for all refills.)

Employer's Exhibit No. 4—(Continued)

9. Itemize your services.

10.

Very truly yours,

DEPARTMENT OF LABOR AND
INDUSTRIES MEDICAL DIVISION,

/s/ W. OLSON.

[Longhand]: Braley, Inc., 738 St. Helens Ave.,
Tacoma, Wn.

[One-Cent U. S. Postal Card.]

Reply Card. This Side of Card Is for Address.

Addressee: Department of Labor and Industries,
Olympia, Washington.

[Stamped]: Received Dec. 18, 1950, Olympia,
Wash.

Certificate of Disability
Doctor's Statement

Claim No.: B-811942.

Name of claimant: Robert Markovich.

Present address: 38220 Asotin St., Tac.

Name of employer: Western Boat Bldg. Co.

Date of injury: 10/18/50.

Date quit work due to injury: 10/18/50.

Did you examine claimant today? no.

Is claimant able to resume work? no.

If so, what date?.....

Did you instruct claimant to return to work? no.

Employer's Exhibit No. 4—(Continued)

Is treatment concluded? no.

If still disabled state approximately when able to work?

Will he have any permanent disability? possibly.

Remarks:

.....

.....

.....

Date: 12/13/50.

/s/ W. S. PETERSON, M.D.
(Attending Physician.)

Workman's Statement

Have you returned to work?.....

If so, on what date did you do so?.....

If you did not return to work for your same employer, state name and address of other employer?
.....

Date: 12/13/50.

/s/ ROBERT MARKOVICH.
(Claimant.)

Received December 18, 1950.

Employer's Exhibit No. 4—(Continued)

[One-Cent U. S. Postal Card.]

Reply Card. This Side of Card Is for Address.

Addressee: Department of Labor and Industries,
Olympia, Washington.

[Stamped]: Received Jan. 22, 1951, Olympia.

Certificate of Disability

Doctor's Statement

Claim No. B-811943.

Name of claimant: Robert Markovich.

Present address:

Name of employer:

Date of injury: 10/18/50.

Date quit work due to injury:

Did you examine claimant today? Yes.

Is claimant able to resume work? no.

If so, what date?.....

Did you instruct claimant to return to work? no.

Is treatment concluded? no.

If still disabled state approximately when able to
work? undet.

Will he have any permanent disability? probably.

Remarks:

.....

.....

.....

Date: 19 Jan., '51.

/s/ W. G. PETERSON.

(Attending Physician.)

Employer's Exhibit No. 4—(Continued)

Workman's Statement

Have you returned to work?.....
 Have you applied for unemployment benefits? No.
 If you did not return to work for your same employer,
 state name and address of other employer?

Date: 19-1.

/s/ ROBERT MARKOVICH.

(Claimant.)

Received January 22, 1951.

U. S. Department of Labor
 Bureau of Employees' Compensation

CERTIFICATE

This is to certify that the attached proceedings before the Deputy Commissioner of the Fourteenth Compensation District of the U. S. Department of Labor, Bureau of Employees' Compensation, in the matter of:

Name of Proceeding: Robert Markovich.

Case No.: 217-21.

Place: Tacoma, Wash.

Date: Feb. 26, 1951.

were held as therein appears, and that this is the original transcript thereof for the files of the U. S. Department of Labor.

ACE REPORTING CO.

By /s/ GLENN WALSTON.

Official Reporter.

[Endorsed]: Filed July 5, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure as amended, and Subdivision 1 of Rule 11 as amended, of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith all of the original papers and pleadings in the above-entitled cause, pursuant to Plaintiffs' Designation of Record on Appeal herein, and the said papers and pleadings herewith transmitted constitute the Record on Appeal from that certain Order of the above-entitled Court, filed and entered on July 17, 1951, to the United States Court of Appeals for the Ninth Circuit, at San Francisco, California, and are identified as follows:

1. Petition for Injunction.
2. Motion for Interlocutory Injunction.
3. Order Fixing Time for Hearing Interlocutory Injunction.
4. Marshal's Return on Summons (on Robt. Markovich, U. S. Atty. and Atty. Gen.).
5. Marshal's Return on Order.
6. Motion, Robert Markovich, to Intervene as Defendant.

7. Order Allowing Robert Markovich to Intervene.

8. Stipulation and Order Continuing Preliminary Injunction.

9. Marshal's Return on Summons & Petition for Injunction.

10. Marshal's Return on Order.

11. Stipulation and Order Striking Trial Date.

12. Answer, O'Leary, to Petition.

13. Brief on behalf O'Leary.

14. Affidavit of Mailing.

15. Answer, Markovich, to Petition for Injunction.

16. Brief on behalf Markovich.

17. Plaintiffs' Trial Memo.

18. Transcript of Proceedings before Commissioner.

19. Defendant's Memo in Opposition to Plaintiffs' Motion for Trial de novo.

20. Order (after trial) (filed and entered July 17, 1951).

21. Stipulation re compensation, etc., pending appeal.

22. Plaintiffs' Notice of Appeal.

23. Cost Bond on Appeal.

24. Designation of Record on Appeal.

I do further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the parties hereto for the preparation of the Record on Appeal in this cause, to wit:

Notice of Appeal (Plaintiffs') \$5.00

and that said fee has been paid to the Clerk by Plaintiffs.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Tacoma, Washington, this 10th day of September, 1951.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ E. E. REDMAYNE,
Deputy.

[Endorsed]: No. 13091. United States Court of Appeals for the Ninth Circuit. Western Boat Building Company, a Partnership, and United Pacific Insurance Company, a Corporation, Appellants, vs. J. J. O'Leary, Deputy Commissioner, 14th Compensation District, Under the Longshoremen's & Harbor Workers' Compensation Act, and Robert Markovich, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed September 12, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13091

WESTERN BOAT BUILDING COMPANY, a
Partnership, and UNITED PACIFIC INSUR-
ANCE COMPANY, a Corporation,

Appellants,

vs.

J. J. O'LEARY, Deputy Commissioner, 14th Com-
pensation District, Under the Longshoremen's
& Harbor Workers' Compensation Act, and
ROBERT MARKOVICH,

Appellees.

STATEMENT OF POINTS

Comes Now appellants, Western Boat Building Company, a partnership, and United Pacific Insurance Company, a corporation, and propose on its appeal to the Circuit Court of Appeals for the Ninth Circuit to rely on the following points as error:

1. The lower court erred in not according a de novo hearing to appellants on the question of whether the appellee, Markovich, was injured on navigable waters of the United States.

2. The court erred in holding appellee Markovich was injured on navigable waters and subject to the Longshoremen's and Harbor Workers Act.

3. The Court erred in holding appellee Markovich was not under the exclusive provisions of the

Workmen's Compensation Act of the State of Washington.

BOGLE, BOGLE & GATES,
Attorneys for Appellants, Western Boat Building
Company, a Partnership, and United Pacific
Insurance Company, a Corporation.

[Endorsed]: Filed September 26, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD
TO BE PRINTED

To the Clerk of the United States Court of Appeals
for the Ninth Circuit:

1. Petition for Injunction.
2. Motion for Interlocutory Order.
3. Motion to Intervene as Defendant.
4. Order Allowing Intervention.
5. Defendant O'Leary's Answer.
6. Intervenor Markovich's Answer.
7. Order of Dismissal Entered July 17, 1951.
8. Appellant's Exhibit, Claim File of State Department of Labor and Industries, excluding last page thereof.
9. Notice of Appeal.
10. Designation of Record.

11. Cost Bond on Appeal.
12. Certificate of Clerk to Record on Appeal.

Dated this 20th day of September, 1951.

BOGLE, BOGLE & GATES,
Attorneys for Appellants, Western Boat Building
Company, a Partnership, and United Pacific
Insurance Company, a Corporation.

[Endorsed]: Filed September 26, 1951.

United States Court of Appeals
For the Ninth Circuit

WESTERN BOAT BUILDING COMPANY, a partnership, and
UNITED PACIFIC INSURANCE COMPANY, a corporation,
Appellants,

vs.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Com-
pensation District, under the Longshoremen's and
Harbor Workers' Compensation Act, and ROBERT
MARKOVICH,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLANTS

BOGLE, BOGLE & GATES,
EDW. S. FRANKLIN,
Proctors for Appellants.

603 Central Building,
Seattle 4, Washington.

United States Court of Appeals

For the Ninth Circuit

WESTERN BOAT BUILDING COMPANY, a partnership, and
UNITED PACIFIC INSURANCE COMPANY, a corporation,
Appellants,

vs.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, and ROBERT MARKOVICH,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
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United States Court of Appeals

For the Ninth Circuit

WESTERN BOAT BUILDING COMPANY, a
partnership, and UNITED PACIFIC IN-
SURANCE COMPANY, a corporation,
Appellants,

vs.

J. J. O'LEARY, Deputy Commissioner,
Fourteenth Compensation District, un-
der the Longshoremen's and Harbor
Workers' Compensation Act, and ROB-
ERT MARKOVICH, *Appellees.*

No. 13091

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLANTS

STATEMENT DISCLOSING JURISDICTION

This is an appeal from a final order entered by the United States District Court for the Western District of Washington, Southern Division. This cause was originally instituted by appellants (employer of one Markovich, and its insurance carrier under the Longshoremen's and Harbor Workers' Act) seeking to review and permanently enjoin (Title 33, U.S.C.A. §925) a certain "Compensation Order-Award of Compensation" (Tr. 10-13) made by J. J. O'Leary, Deputy Commissioner under the Longshoremen's and Harbor

Workers' Act, and filed in his office March 20, 1951, awarding appellee Markovich compensation for his injuries.

By the order appealed from, the District Court dismissed appellants' petition for an injunction, from which final order this appeal is taken pursuant to the provisions of Title 33, U.S.C.A. §921 and Title 28, §2107 of the new Federal Judicial Code (effective September 1, 1948).

STATEMENT OF THE CASE

One Robert Markovich, an amphibious worker (Tr. 34) was employed as a fastener by appellant Western Boat Building Company, at its shipyard, in Tacoma, Washington. On October 18, 1950, he fell from the deck of the tug "EL SOL" to the shore or beach below (Tr. 37). The tug had been withdrawn from the navigable waters of Tacoma Harbor by means of a marine railway and was resting on the shore (Tr. 35) at the time of the accident.

The marine railway employed in this operation consisted of a huge wooden cradle, running from the shore into the water (about 150 feet) (Tr. 35) on railroad tracks, which was placed under the keel of the tug, when afloat, and then the cradle, with the tug upon it, were pulled on shore by means of shore winches and the tug beached for repairs (Tr. 56).

Six days after his injury, Markovich filed a claim for compensation with the Department of Labor & Industries of the State of Washington, which state agency administers the Workmen's Compensation Act

of the State of Washington. The claim was allowed November 14, 1950, but further investigated by the State Department, and monthly compensation payments to Markovich began December 15, 1950. Three such monthly awards of compensation in the amount of \$75.00 had been paid Markovich by the Department of Labor & Industries, in accordance with the provisions of the Workmen's Compensation Act of the State of Washington, for temporary total disability (Employers Exhibit 4).

Later, and while receiving compensation from the State of Washington, Markovich, on January 10, 1951, filed a claim for compensation benefits with appellee J. J. O'Leary, Deputy Commissioner, under the Longshoremen's and Harbor Worker's Compensation Act. A hearing was held on his claim at Tacoma, Washington, on February 26, 1951 (Tr. 29 to 59), resulting in the entry of an order by appellee Deputy Commissioner, awarding Markovich compensation under the provisions of the Longshoremen's and Harbor Worker's Compensation Act (Tr. 11-12).

Appellants petitioned the district court to enjoin the enforcement of this order, which was denied and appellants' petition dismissed (Tr. 22 to 25) from which this appeal is taken.

SPECIFICATION OF ERRORS

1. The lower court erred in dismissing appellants' petition to restrain the enforcement of the compensation order of the Deputy Commissioner as that order was arbitrary and capricious and not in accordance

with law, since Markovich's injury was subject to the exclusive jurisdiction of the Washington Compensation Act.

2. The lower court erred in not according a *de novo* hearing to appellants on the jurisdictional question of whether Markovich was injured on navigable waters.

ARGUMENT

Summary of Argument on First Assignment of Error

Markovich's injury was not subject to the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act since (1) it did not occur on navigable waters and (2) compensation for such injury was and could be validly provided by the Compensation Act of the State of Washington.

Status of Industrial Injuries on Navigable Waters Before Act

Numerous state workmen's compensation acts were enacted beginning in 1910. In 1917, the Supreme Court in the case of *Southern Pacific v. Jansen*, 244 U.S. 205, 81 L.ed. 1096, refused to permit the New York Compensation Act to be applied to an injury occurring to a longshoreman on navigable waters since

"As here applied the Workmen's Compensation Act conflicts with the general maritime law which constitutes an integral part of the Federal law under art. 3, section 2 of the Constitution and to that extent is invalid."

The court stressed the uniformity required by the Constitution in admiralty matters.

In the subsequent case of *Millers Indemnity Under-*

writers v. Braud, 279, U.S. 59, 70 L.ed. 470, involving the death on navigable waters of a diver sawing off submerged piling, the Supreme Court promulgated the doctrine of "local concern" permitting the application of state compensation acts to injuries occurring on navigable waters where

"the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic features of the general maritime law."

In applying this decision the courts were forced to rule on a case-to-case basis as to the relationship of the injured man's occupation to the general maritime law, and permitted the application of state compensation acts to a varied type of industrial injuries, occurring on navigable waters.

Congress sought to eliminate the jurisdictional uncertainties arising from the *Jensen* decision by an amendment enacted October 6, 1917, to the saving clause, Section 3 of §24 of the Judiciary Act of 1789, by giving claimants injured on navigable waters their rights and remedies under any applicable state compensation act.

This provision was held unconstitutional in the case of *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 64 L.ed. 834, as destroying the harmony and uniformity of the admiralty law as contemplated by the Federal constitution.

By a subsequent amendment to Clause 3 of §24 of the Judicial Code (Act of June 10, 1922) state compensation acts were made applicable by Congress to

all injuries occurring on navigable waters except as to masters and members of the crew.

This amendment was similarly declared unconstitutional by the Supreme Court in the case of *Washington v. Dawson & Co.*, 264 U.S. 218, 68 L.ed. 646, for the same reason. In this case the Supreme Court suggested that Congress could lawfully pass a compensation act applicable to injuries occurring on navigable waters which was of general application, but ruled Congress was precluded from delegating this power to the several states as it had attempted to do in the *Knickerbocker* and *Dawson* cases, *supra*.

Congress accepted this judicial hint and passed the Longshoremen's and Harbor Workers' Act (46 U.S. C.A. §901 to §951, inc.) which was approved March 4, 1927.

The Congressional avowal of purpose of the enactment is found in the report of the Senate Committee of the Judiciary, accompanying the bill (S.R. 973, 69th Cong. 1st Session):

“If longshoremen could avail themselves of the benefit of State Compensation laws, there would be no occasion for this legislation; but, unfortunately they are excluded from these laws by reason of the character of their employment; and they are not only excluded but the Supreme Court has more than once held that Federal legislation can not, constitutionally, be enacted that will apply State laws to this occupation.(* * * Citing cases.) It thus appears there is no way of giving these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern

principle of compensation without enacting a uniform compensation statute.”

Limitations on Jurisdiction of Longshoremen's and Harbor Workers' Act

The jurisdictional scope or coverage of the Longshoremen's and Harbor Workers' Act is promulgated by 46 U.S.C. §903(a) reading as follows:

“Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon navigable waters of the United States (including any dry-dock) *and if recovery for the disability or death may not validly be provided by State law*” (Italics ours).

This Act was an exercise of Article III, §2, of the Federal Constitution extending the judicial powers of the United States to:

“All cases of admiralty and maritime jurisdiction.”

In the case of *Crowell v. Benson*, 285 U.S. 22, 76 L.ed. 598, which upheld the constitutionality of this Act, the court said:

“As the Act relates solely to injuries occurring upon the navigable waters of the United States, it deals with the maritime law, applicable to matters which fall within the admiralty and maritime jurisdiction (Const. Art. 3, Sec. 2) ; *Nogueira v. New York, N. H. and H. R. Co.*, 281 U.S. 128) and of the general authority of congress to alter or revise the maritime law which shall prevail throughout the country is beyond dispute. In limiting the application of the Act to cases where recovery ‘may not validly be provided by State law,’ the Congress

evidently had in view the decisions of this Court with respect to the scope of its national legislature.”

Traditionally the jurisdictional test of an admiralty tort is its occurrence upon the navigable waters of the United States. *The Plymouth* (1866) 70 U.S. (3 Wall.) 20; *The Admiral Peoples*, 295 U.S. 649, 19 L.ed. 1633.

Congress sought to substitute for this tort liability occurring on navigable waters, a compensation law of general application to longshoremen and stevedores. It was not attempting to encroach upon or disturb the well settled jurisdiction of state workmen compensation acts to injuries occurring on land nor on navigable waters if “of local concern.” It was not attempting to exclusively occupy the field of industrial injuries occurring to amphibious workers, since the Act was only effective provided the injury *could not be validly covered by state workmen’s compensation acts* and the Supreme Court, in numerous cases in developing the “local concern” doctrine had sanctioned application of state acts to injuries occurring on navigable waters.

That Congress in passing the Act was merely attempting to bridge the gap between the “local concern” doctrine cases and injuries on navigable waters to longshore or harbor workers and not attempting to narrow or restrict the broad scope or jurisdictional reach of state compensation acts is evident from the observation of the United States Supreme Court in the case of *Swanson v. Marra Brothers*, 328 U.S. 1, 90 L.ed. 1045, where the court said:

“The Senate Judiciary Committee, in recommending the legislation which became the Longshoremen’s and Harbor Workers’ Compensation Act, expressed doubt as to the constitutional power of Congress to give recovery to such employees injured on shore, saying ‘These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship, so as to bring them within the maritime jurisdiction of the United States.’ Sen. Rep. No. 973, 69th Cong. 1st Sess. p. 16. *CF. Cleveland Terminal & V. R. Co. v. Cleveland S. S. Co.*, 208 U.S. 316, 52 L.ed. 508, 28 S.Ct. 414, 13 Ann. Cas. 1215, and *The Admiral Peoples*, 295 U.S. 649, 79 L.ed. 1633, 55 S.Ct. 885, both *supra*.”

Congress Did Not Pre-empt Compensation Field by Act

The narrow reach of the Congressional purpose in passing this legislation as evidenced by §903 *supra* was further noted by the Fourth Circuit in the case of *U. S. Casualty v. Taylor*, 64 F.(2d) 521 where the court said:

“Section 903(a) of the act provides: ‘Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury, occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen’s compensation proceedings may not validly be provided by State Law.’ We are particularly concerned here with so much of this limitation as restricts recovery to those instances where recovery through workmen’s compensation proceedings may

not validly be provided by state law.' The significance of this phrase was brought out in *Crowell v. Benson*, 285 U.S. 39, 52 S.Ct. 285, 287, 76 L.ed. 598, where it was said: 'In limiting the application of the act to cases where recovery through workmen's compensation proceedings may not validly be provided by State law, the Congress evidently had in view the decisions of this Court with respect to the scope of the exclusive authority of the national Legislature. The propriety of providing by federal statute for compensation of employees in such cases had been expressly recognized by this Court, and within its sphere the statute was designed to accomplish the same general purpose as the Workmen's Compensation Laws of the States.' The cases referred to as bearing out this interpretation of the language were *Southern Pacific Co. v. Jensen*, *Knickerbocker Ice Co. v. Steward* and *Washington v. Dawson*, *supra*, in which the authorized scope of the state compensation statutes were discussed, and it was shown that, in so far as they attempted to deal with cases within the maritime and admiralty jurisdiction, they were unconstitutional.

"We conclude from these pronouncements of the Supreme Court that the federal act is applicable only to workmen engaged in maritime employment, and that compensation under the act may lawfully be paid only in those cases in which a state has no authority to act. The phrase 'may not validly be provided by State law' obviously refers to the authority of a state to act and not to the inquiry as to whether a state has exercised its power. Congress intended to occupy only a portion of the field (the crews of ships being excepted) from which the states are excluded, and to abstain altogether from duplicating the work of the states in

the field which they are permitted to enter. Concurrent remedies in both state or federal proceedings are not available. It was the original policy of Congress to leave to the states, as far as possible, to provide compensation to workers for industrial accidents, and this policy has been continued in the present statute. It is noteworthy that by this course of action the requirements of uniformity in matters of admiralty and maritime jurisdiction is observed. *Southern Pacific Company v. Jensen*, 244 U.S. 205, 215, 216, 37 S.Ct. 524, 61 L.ed. 1086, L.R.A. 1918C, 451, Ann. Cas. 1917E, 900."

Markovich's Injury Did Not Occur on Navigable Waters

There is no conflict in the evidence that Markovich was not injured on navigable waters. The testimony before the Deputy Commissioner conclusively established that Markovich fell to the shore or beach from the tug EL SOL, which had been pulled on shore from the navigable waters of Tacoma Harbor and rested on the beach or shore, on the cradle of a marine railway (Tr. 35, 41). Markovich states he was amidships on the tug when he fell (Tr. 43). Markovich stepped on a loose board on the deck of the tug (Tr. 37). The tug EL SOL was about 136 feet long and the cradle of the marine railway was about 150 feet long (Tr. 58). He fell to the beach below and in falling struck the staging (Tr. 37). Both the inception and culmination of his injury occurred on shore, to which the State Act applied.

Factually Markovich's act of falling from the tug to the beach was comparable to the injury to the shore-side stevedore in the case of *Smith v. Taylor & Son*,

276 U.S. 179, 72 L.ed. 520. The stevedore there was standing on a staging affixed to a dock and was knocked off the stage by the sling and drowned in the waters below. The employer attacked the assumption of jurisdiction by the Louisiana Compensation Act of the injury. In holding the injury occurred on land, the United States Supreme Court said:

“The blow by the sling was what gave rise to the cause of action. It was given and took effect while the deceased was upon the land. It was the sole, immediate and proximate cause of his death. The substance and consummation of the occurrence which gave rise to the causes of action took place on land.”

Conversely, where an off-shore stevedore was knocked by a swinging hoist to the wharf where he sustained injuries, the Supreme Court in the case of *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647, 79 L.ed. 1631, held the Michigan Compensation Act inapplicable to the injury since it was consummated on navigable waters. See also *The Admiral Peoples*, *supra*.

Torts on Marine Railways Are Not Subject to Admiralty Jurisdiction

Because they have been withdrawn from navigable waters and rest on land and are not vessels, marine railways have been traditionally held not subject to admiralty jurisdiction for torts.

In *THE PROFESSOR MORSE*, 23 Fed. Rep. 803, a libel for alleged maritime tort for damage done a marine

railway by a vessel was disallowed on jurisdictional grounds. While a vessel was being hauled out of the water on a marine railroad, and the vessel's stern drawing three feet of water, the vessel suddenly keeled over. The court, after a minute description of the mechanism of a marine railway (similar to that of appellants), said:

“From this description of the structure, it can hardly be doubted that it was not in any proper sense, a craft or vessel intended to float on the water. The upper end was securely fastened to the land — as much so as a wharf built out into the stream — and its character is not changed because the ways ran down below the ebb and flow of the tide, to facilitate the transfer of vessels from the water to the shore. The *Maud Webster*, 8 Ben. 547, was a stronger case for the libellants; but in that case Judge Blatchford, after argument and reargument, dismissed the libel for want of jurisdiction.”

Marine Railways Are Not Drydocks Under Section 903

We assume that appellees will advance the generally discredited argument that a marine railway is a “dry dock” as that term is used in §903, *supra*, and contend that the synonymy of these terms would justify application of the Longshoremen’s and Harbor Workers’ Compensation Act to an injury received on a marine railway. This argument completely overlooks the jurisdictional provision of §903 *supra*, that the injury must occur “on navigable waters of the United States” to be compensable under the Act.

Weight of Authority Establishes Rule Marine Railways Not Subject to Longshoremen's and Harbor Workers' Act

On the first occasion in which the question at bar was presented, United States District Judge Groaner in the Eastern District of Virginia held in the case of *Colonna's Shipyard v. Lowe* (Va.) 22 F.(2d) 843 (1927) that the provision of the Virginia State Compensation Act and not the Federal Law was applicable to an injury occurring to a workman on a marine railway which the Deputy Commissioner had classified as under Federal Law. The court said:

“Applying these tests to the cases under consideration, it would seem to follow that since the employment related to work to be done on a completed structure, the contract was maritime in its nature; but, since the vessel and the railway on which she was drawn were both on high land, and the injury was sustained under those conditions, the tort was non-maritime for it has always been the rule that in cases of tort, different from cases of contract, the test of jurisdiction in the admiralty depends upon the place where the injury occurs and since, as has been remarked, the injury here was on dry land, it follows that the Virginia State Compensation Act is valid, and the federal law inapplicable.”

In the case of *Norton v. Vesta Coal Company* (3 C.A.A.) 63 F.(2d) 165, the Third Circuit Court followed the *Colonna* case in an opinion written by Judge Buffington. The court said:

“The controlling federal statute involved provides the term ‘employer’ means an employer any of whose employees are employed in maritime em-

ployment, in whole or in part, upon the navigable waters of the United States (including any dry dock), and the contention is that Congress meant to include in the term 'dry dock' a marine railway. We cannot make such assumption or speculation.

"We know clearly what in common speech a dry dock is. We also know what, in common speech, a marine railway is. In this regard see *The Professor Morse* (D.C.) 23 F. 803. While they are used for a like purpose, it by no means follows they are interchangeable terms. A contract to build, or rent, a dry dock would not be fulfilled in building a marine railway, and conversely, a contract to rent, or build, a marine railway would not be fulfilled by a dry dock. With these terms describing two different structures, it seems clear that, when Congress used the word 'dry dock,' it meant a dry dock in the common acceptation of the term, and did not intend to include any other thing. We rest on firm ground when we take Congress at its word. We enter into a field of speculation when we impute to Congress an intent to include something it did not say it included. The mention of one of a class is the exclusion of others. So regarding, the judgment below is affirmed."

The Government took an appeal from this decision to the Supreme Court of the United States. On January 15, 1934, the United States Supreme Court in a per curiam decision, reported in 290 U.S. 613, 78 L.ed. 536, made the following order:

"per curiam as it appears that the government has now adopted the conclusion that the decision below is correct and no substantial controversy is presented at the bar of this court the writ of certiorari herein is dismissed."

In view of this legal acquiescence in the correctness of the rule of the *Norton* case by the Government, we are utterly at a loss to understand the ruling of the Deputy Commissioner in the present instance.

It is true that the Fifth Circuit in the cases of *Continental Casualty Company v. Lawson*, 64 F.(2d) 802 and *Maryland Casualty Company v. Lawson*, 101 F.(2d) 732, dissent from the rule of law officially promulgated by the United States Supreme Court in the *Norton* case, *supra*. These cases proceed on the erroneous assumption that a marine railway is embraced in the phrase "drydock" as used in §3(a) of the Act. This is likewise the contention of the Deputy Commissioner in the instant case.

A short answer to this obviously incorrect interpretation of the term "drydock" is found in the *Norton* case, *supra*.

The court will take judicial notice that the function, structure and locality of a marine railway are entirely dissimilar from those of a dry dock. The obvious reason why Congress did not attempt to include marine railways within the reach of the Act was that it did not have the constitutional power to do so because of the location of marine railways on land.

The obvious differences between a marine railway and a drydock can be easily discerned by a study of the dictionary definitions of these two utterly dissimilar types of structures.

In the International Maritime Dictionary (1948) they are defined as follows:

“MARINE RAILWAY. An inclined plane situated on the embankment of a river or in a harbor and equipped with tracks, cradle and winding machinery and on which vessels are hauled up for bottom cleaning and repairs. Also called slipway, or patent slip. Marine railways are built parallel or perpendicular to the embankment, the ships being hauled up sideways or end on as the case may be. The declivity varies from $1/15$ to $1/25$. Marine railways are generally used for small and medium size vessels the maximum being around 5,000 tons displacement.”

“DRY DOCK.” An enclosed basin into which a ship is taken for underwater cleaning and repairing. It is fitted with watertight entrance gates which when closed permit the dock to be pumped dry. In modern dry docks the gates opening in the middle and hinged at sides have been replaced by a caisson or pontoon that fits closely into the entrance. The caisson is flooded and sunk in place, and can be pumped out, floated and warped away from the dock entrance to permit passage of vessels. Also called graving dock, graving dry dock.”

Similarly in a Glossary of Sea Terms (1927), their essential dissimilarities are again emphasized.

“MARINE RAILWAY. Railway is an inclined structure at the water's edge which extends below the water. It carries a cradle which moves on rollers or wheels. The cradle run below the water receives the vessel, usually at high water, which is then hauled out by steam or electric power.”

“DRY DOCK, a water-tight basin which after pumping out excludes the water and allows examination and work upon the bottom of a vessel. Vessels are floated in and out through the remov-

al of a bulkhead called a caisson, itself capable of floating or flooding. A floating dock receives a vessel when it is submerged to a proper depth, after which the water-tight compartments of the dock are pumped out and the buoyancy of the dock raises the vessel. A graving dock, usually walled with stone, was one in which vessels' bottoms were formerly cleaned by a burning process called graving or greaving, but the term still applies to the walled up excavated docks seen in Navy Yards. They are more substantial and permanent than floating docks, but are far more costly. There are screw docks comprising a platform which submerges to receive a vessel, the whole being raised by screws or jacks."

Marine Railways Covered by Washington State Compensation Act

Washington being an important maritime state with a large shipbuilding industry, has been long confronted with the application of its Compensation Act both to on-shore and off-shore workers. Its legislature by Chapter 79, Laws of 1931 passed Rem. Rev. Stat. §7693-a, of the State Compensation Act reading as follows:

"The provisions of this act shall apply to all employers and workmen, except a master or member of a crew of any vessel, engaged in maritime occupations for whom no right or obligation exists under the maritime laws for personal injuries or death of such workmen."

All shipbuilding operations are declared to be extra-hazardous under §7674 of the Washington State Compensation Act. By §7676, Rem. Rev. Stat., all ship-

building operations have been placed in class 9 of the Washington Compensation Act for premium classification purposes.

“Class 9-1 Boatbuilding ‘steel hulls’ shipbuilding ‘steel hulls’ (includes all operations within shipyards).

“Class 9-2 Boatbuilding ‘wooden hulls’ shipbuilding, ‘wooden hulls’ (includes all operations within shipyards).”

By §7673, Rem. Rev. Stat., the Workmen’s Compensation Act is made the exclusive remedy for all industrial injuries occurring in the State of Washington.

In 1937 (ten years after the passage of the Longshoremen’s and Harbor Workers’ Compensation Act) the Washington Supreme Court was confronted with the question of whether a worker injured on a marine railway was entitled to coverage under the Washington Act. It ruled he was in the case of *Rohlf’s v. Dept. of Labor & Industries*, 190 Wash. 566, 69 P.(2d) 817, following the current weight of authority. The court said in part:

“A marine railway, such as that upon which the ‘Floyd’ was raised, runs from some distance in the water to any desired point on dry land. It is not like a floating dock or a dry dock, into which a vessel which needs repair floats on the surface of the water. Upon a marine railway, the boat is hauled by some power other than its own and not connected with navigation, out of the water and to a point upon the land, where the boat remains until its future is determined by its owner. It may return to its native element, or it may be destroyed,

with or without the intention to terminate its career as a vessel. As above stated, it is the law that the same workman, while working alternately on a dock and on a ship attached thereto, varies the nature of his employment as he passes from the dock to the ship and back again. While on the ship he is within the maritime jurisdiction; while on the dock, he is under the jurisdiction of the state law.

“Respondent was working on land, not on the water; the labor which he was performing was, in the language of this court in the case of *Puget Sound Bridge & Dredging Co. v. Department of Labor & Industries*, 185 Wash. 349, 54 P.(2d) 1003, *supra*, quoting from *Dewey Fish Co. v. Department of Labor & Industries*, *supra*, ‘a matter of purely local concern, unconnected with navigation,’ and was essentially non-maritime in its nature.

“Careful consideration of the problem here presented convinces us that the trial court correctly held that, while working on the ‘Floyd,’ respondent was engaged in a non-maritime employment, and was within the protection of the state workmen’s compensation act.

“This conclusion is supported by the following authorities, in addition to those above cited: *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263, 42 S.Ct. 473, 25 A.L.R. 1013; *Smith & Son v. Taylor*, 276 U.S. 179, 48 S. Ct. 228; *Colonna’s Shipyard v. Lowe*, 22 F.(2d) 843; *Norton v. Vesta Coal Co.*, 63 F.(2d) 165.

“The trial court correctly ruled that respondent, at the time he was injured, was within the protection of the workmen’s compensation act of this

state, and the judgment appealed from is accordingly affirmed.”

A similar result had previously been reached in the case of *Giske v. Autrem*, by the Superior Court of King County, Wash., 1931 American Maritime Case, p. 1200.

As a result of these decisions, the large number of small shipbuilding plants operating in the state of Washington have regularly reported their premiums on marine railways to the State fund, which has compensated employees injured thereon. No challenge to the jurisdiction of the Washington Act to cover this type of employment has been made until the present case.

Injuries on Marine Railways Are Matters of Local Concern

Conceding, *arguendo*, that Markovich's injuries occurred “on navigable waters of the United States,” since the marine railway was withdrawn from navigable waters and resting on the shore, his employment and injuries were purely matters of local concern (see *Rohlf's v. Dept. of Labor & Industries, supra*) and unconnected with navigation and essentially non-maritime in character, to which the Washington Compensation Act applied; under the following decisions:

Millers Underwriters v. Braud, supra;

Sultan Ry. and Timber Co. v. Dept. of Labor & Industries, 277 U.S. 135, 72 L.ed. 820;

Grant Smith Porter Shipbuilding Co. v. Rhode, 257 U.S. 461, 66 L.ed. 321;

Rosengrant v. Harvard, 273 U.S. 664, 71 L.ed 829.

The facts in the case at bar are strikingly similar to those in the case of *Alaska Packers Association v. Industrial Accident Commission of the State of California*, 276 U.S. 467, 72 L.ed. 656. There a fisherman was injured while pushing a stranded boat into navigable waters. In permitting the State Compensation Act to apply, the Supreme Court said:

“Whether in any possible view, the circumstances disclose a cause within the admiralty jurisdiction we need not stop to determine. Even if an affirmative answer be assumed, the petitioner must fail. Peterson was not employed merely to work on the bark or the fishing boat. He also undertook to perform services as directed on land in connection with the canning operations. When injured certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. The work was really local in character.”

Markovich's Injuries in “Twilight Zone” of Conflicting Jurisdictions

The doctrine of *Davis v. Department of Labor & Industries*, 317 U.S. 249, 87 L.ed. 246 and its subsequent amplification by the United States Supreme Court compels reversal of this case.

There the State of Washington had declined to assume jurisdiction of a death claim to a workman who drowned on a barge while assisting in the loading

thereon of scrap iron from a bridge which was in the process of being dismantled. The Washington Supreme Court (12 Wn.(2d) 349, 121 P.(2d) 365) held the workman's death occurring on navigable waters while loading a barge to be exclusively in admiralty jurisdiction and the State Act did not apply. This holding was reversed by the United States Supreme Court, in a decision which gave birth to the "twilight zone" doctrine of conflicting compensations jurisdictions between the State Acts and the Longshoremen's and Harbor Workers' Act. Justice Black said:

"There is, in the light of the cases referred to, clearly a twilight zone in which employees must have their rights determined case by case and in which particular facts and circumstances are vital elements. That zone includes persons, such as decedent, who are as a matter of actual administration protected under the state compensation act."

The Supreme Court held that Rem. Rev. Stat. §7674 and §7693(a), *supra* could be applied to decedent's death without any constitutional objection, saying:

"Under all circumstances of this case we will rely on the presumption of constitutionality in favor of this state enactment; for any contrary decision results in our holding the Washington Act unconstitutional as applied to this petitioner. * * * Granting the full weight of the presumption, and resolving all doubts in favor of the Act, we hold the Constitution is no obstacle to petitioner's recovery."

In an effort to eliminate the uncertainties and complexities of conflicting compensation jurisdictions, the United States Supreme Court has greatly broadened

the rule of the *Davis* case, *supra*, and permitted application of state compensation acts to injuries occurring on navigable waters to workmen working on completed vessels in circumstances which were previously held to be committed to the exclusive maritime jurisdiction and beyond the reach of State Acts, where the State first assumed jurisdiction.

In the case of *Baskin v. Industrial Accident Commission*, 201 P.(2d) 549, the injured workman was injured while attempting to free a crane which had been fouled on the vessel and fell down the hold. He filed a claim for compensation under the California Compensation Act which was denied for the reason that the workman, while engaged in repairing a completed ship lying in navigable waters and fitting her for stowage of cargo, was engaged in a task which had an intimate connection with commerce and the State Workmen's Compensation Act could not be applied. This case was reversed on the authority of the *Davis* case, *supra*, at 338 U.S. 584, 94 L.ed. 523.

In a re-trial of the case (217 Pac.(2d) 733) the California Court followed the *Davis* case and applied the California Compensation Act against the employer's contention that the Longshoremen's and Harbor Workers' Act was applicable. This decision was again affirmed by the Supreme Court of the United States in 338 U.S. 584, 94 L.ed. 523.

In *Moore's* case, 323 Mass. 462, 80 N.E.(2d) 478 (1948), the application of the Massachusetts Workmen's Compensation Act to a rigger employed on a vessel on a floating drydock was sustained.

In discussing the scope of the *Davis* decision, the Supreme Court of Massachusetts said:

“But the situation was definitely altered by the decision of the Supreme Court of the United States in *Davis v. Department of Labor and Industries of Washington*, 317 U.S. 249, 63 S.Ct. 225, 87 L.ed. 246, written by Mr. Justice Black in 1942. That was not a case of repairs upon a previously completed vessel. It was a case where the employee fell from a barge where he was examining steel that he had just helped to cut from a bridge which was in process of being dismantled.

“The significance of the case, however, lies in its obvious attempt to set up a means of escape from the difficulties involved in drawing the line between State and Federal Authority under the doctrine of the *Jensen* case. The *Davis* case recognizes a presumptive quality in the decisions of Federal authorities under the Longshoremen's and Harbor Workers' Act and a presumption of constitutionality of the State acts as applied to particular cases. The decision does not overrule the *Jensen* case. It does, however, at least as appraised by Mr. Justice Frankfurter, who concurred in it, and Chief Justice Stone, who dissented from it, create a 'twilight zone' or an area of doubt within which the two acts overlap and the injured workman may recover under either of them. It would seem, therefore, that although apparently some heed must still be paid to the line between State and Federal authority as laid down in the cases following the *Jensen* case, the most important question has now become the fixing of the boundaries of the new 'twilight zone,' and for this the case gives us no rule or test other than the in-

definable and subjective test of doubt. Mr. Justice Frankfurter says that 'Theoretic illogic is inevitable so long as the employee * * * permitted to recover' at his choice under either act. 317 U.S. at page 259, 63 S.Ct. at page 230. Probably therefore our proper course is not to attempt to reason the matter through and to reconcile previous authorities, or to preserve fine lines of distinction, but rather simply to recognize the futility of attempting to reason logically about 'illogic,' and to regard the Davis case as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and as designed to include within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other. We can see no other manner in which the Davis case can be given the effect that we must suppose the court intended it should have, and we must assume that the court intends to follow that case in the future.

"We are the more inclined to include within the twilight zone the case of a workman engaged in an ordinary land occupation although occasionally going upon a dry dock or vessel to make repairs because in the latest case of that particular type decided in the Supreme Court of the United States, *John Baizley Iron Works v. Span*, 281, U.S. 222, 50 S.Ct. 306, 74 L.ed. 819, although the case was held to be one exclusively of Federal cognizance, three of the justices dissented, and Mr. Justice Black in his opinion in the Davis case re-

fers to the *Baizley Iron Works* case as if it were one of those responsible for the existing confusion. Moreover, the distinction between working on navigable water in repairing a previously completed vessel and doing precisely the same work on navigable water upon a vessel in process of construction may be thought a narrow one of doubtful practical validity.

“For the reasons stated we are of the opinion that the case now comes within the Workmen’s Compensation Law of this Commonwealth. The Supreme Court of Texas in *Emmons v. Pacific Indemnity Co.*, 208 S.W.2d 884, sustained State jurisdiction in a very similar case in part for similar reasons. The Court of Errors and Appeals of New Jersey in *DeGraw v. Todd Shipyards Co.*, 134 N.J. L. 315, 47 A2d, 338, upheld the State jurisdiction in a similar case, but without citing the *Davis* case. The Supreme Court of the United States denied certiorari sum nomine *Todd Shipyards Corporation v. DeGraw*, 329 U.S. 759, 67 S.Ct. 113, 91 L.ed. 655.”

State Compensation Awards to Markovich Not Voluntary

The lower court declined to apply the rule of the *Davis* case to the case at bar for the reason

“that the payments from the state were voluntary and without an award of compensation under the Workmen’s Compensation Act of said state * * * (Tr. 24).”

The lower court completely misconstrued the exclusive features of the Washington Workmen’s Compensation Act which is compulsory and monopolistic in character and misread the certified copy of Marko-

vich's claim filed with the Department of Labor & Industries (Employer's Exhibit 4).

Rem. Rev. Stat. §7679 provides in part:

“Each workman who shall thereafter be injured in the course of his employment, or his family or dependents in case of death of the workman, shall receive out of the accident fund, compensation, in accordance with the following schedule, and, except as in this Act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever * * *”

This paragraph is followed by a lengthy compensation schedule of awards for varying classifications of injuries. It prescribed a monthly compensation rate of \$75.00 so long as Markovich should be totally temporarily disabled.

Rem. Rev. Stat. §7686 provides in part:

“(a) Where a workman is entitled to compensation under this act, he shall file with the Department, his application for such, together with the certificate of the physician who attended him * * *”

In accordance with these statutory provisions, Markovich filed his claim and application for compensation with the Washington Department of Labor & Industries shortly after his accident, supported by the certificate of his doctor that he would be disabled for one year by this accident. His employer, Western Boat Building Company, stated in its report it had paid premiums on Markovich to the State Fund in Class 9-2 and did not oppose the allowance of the claim by the Department. The Department after first indicating acceptance of the claim (Tr. 63) reinvesti-

gated the same and on December 14, 1950, formally allowed the claim and made its initial award to Markovich in the amount of \$75.00. Formal Findings of Fact determining Markovich was under the State Act were entered (Employer's Exhibit 4). Thereafter on December 20, 1950, and January 24, 1951, two awards of compensation were made to Markovich in like amount.

The Washington Act contemplates that where the Department initially allows a claim, the compensation payments thereafter are made automatically. Only if the Department refused compensation, or denied a workman claimed relief under the Act, would an administrative hearing be held as provided by Rem. Rev. Stat. §7697.

In the case of *Kidder v. Marysville & Arlington R. Co.*, 160 Wash. 471 (Rehearing) p. 472, 295 Pac. 162, 170, a widow filed her claim for compensation and received the statutory benefits. She then sought to sue her deceased husband's employer under the Federal Employers' Liability Act. In considering the status of the departmental findings of fact the widow was under the State Act the court said:

"The appropriate division of the department of labor and industries had the power to make a finding of fact, first, as to the classification of the logging railroad; and second, as to the rights of respondent under her claim for compensation. Such findings in proper cases become binding upon all parties concerned. 34 C.J. 878, §1287; L.R.A. 1916A 266."

By filing for and accepting compensation, the widow

was held estopped to sue. The decision by the Department that Markovich was entitled to compensation under the State Act was binding on Markovich, his employer and the State.

“Since the department is the original and sole tribunal with power to so determine the facts; and its findings are reviewable only on appeal, it must follow that a judgment by it, resting upon a finding of fact * * * is final and conclusive upon the department and upon the claimant, unless set aside on an appeal authorized by statute * * * *Abraham v. Department of Labor & Industries*, 128 Wash. 160.”

We submit that by filing his claim for compensation under the Washington Act and invoking State relief and the entry by the Department of Labor & Industries of findings of fact and order awarding Markovich compensation, he is estopped from seeking compensation elsewhere. *Kidder v. Marysville & Arlington R., supra*.

Washington Act Provides Markovich's Exclusive Remedy

By §7673 of Rem. Rev. Stat. the Washington Act provided Markovich's exclusive remedy for compensation. It reads as follows:

“The common law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman

and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage-worker. The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra-hazardous work, and their families and dependents is hereby provided regardless of questions of fault *and to the exclusion of every other remedy, proceeding or compensation*, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdictions of the courts of the state over such causes are hereby abolished, except as in this act provided.” (Italics ours.)

In *Magnolia Petroleum v. Hunt*, 320 U.S. 430, 88 L.ed. 149, the Texas Compensation Act was likewise made the exclusive remedy. After obtaining compensation from Texas, the claimant filed under the Louisiana Act. His claim was denied by the Supreme Court upon the grounds that the full faith and credit clause of the Constitution applied to the compensation order of Texas and prohibited such double filing since by statute the Texas award was exclusive.

The court said:

“And we can perceive no tenable ground for saying that a compensation award need not be given the same effect as *res judicata* in another state as it has in the state where rendered. Such was the

decision of this court in *Chicago, R.I. & P.R. Co. v. Schendel*, 270 U.S. 611, 70 L.ed. 757, 46 S.Ct. 420, 53 A.L.R. 1265, 26 N.C.C.A. 971, *supra*, in which recovery of an award for compensation under the Iowa Workmen's Compensation Act was held to bar recovery in a suit against the employer in Minnesota to recover for the same injury under the Federal Employers' Liability Act. Both states had, as in this case, allowed recovery as they were free to do but for the full faith and credit clause. This court held that the employee, having had his remedy by the judgment in Iowa, was precluded by the full faith and credit clause from pursuing a remedy for his injury in another state. The remedies afforded to respondent by the Texas and Louisiana Workmen's Compensation Laws are likewise rendered mutually exclusive by the Texas judgment and the full faith and credit clause. The Texas award, being a bar to any further recovery of compensation for respondent's injury, is, by virtue of the full faith and credit clause, exclusive of his remedy under the Louisiana Act.

“It lends no support to the decision of the Louisiana court in this case to say that Louisiana has chosen to be more generous with an employee than Texas has. Indeed, no constitutional question would be presented if Louisiana chose to be generous to the employee out of the general funds in its Treasury. But here it is petitioner who is required to provide further payments to respondent, contrary to the terms of the Texas award, which, if the full faith and credit clause is to be given any effect, was a conclusive determination between the parties that petitioner should be liable for no more

than the amount of the Texas award. For this reason it is not enough to say that a practical reconciliation of the interests of Texas and Louisiana has been effected by the Louisiana court. There has been no reconciliation of the liability established by the Louisiana judgment with the rights conferred on petitioner by the Texas award and the full faith and credit clause."

Lower Court Erred in Failing to Accord De Novo Hearing on Jurisdictional Question of Place of Injury

The lower court denied a de novo review of the question of whether Markovich was injured on navigable waters. This was plainly erroneous.

This is a jurisdictional issue under the case of *Crowell v. Benson*, 285 U.S. 22 76 L.ed. 598, which the district court must decide anew.

Chief Justice Hughes said:

"Assuming that the Federal court may determine for itself the existence of these fundamental or jurisdictional facts, we come to the question,—Upon what record is the determination to be made? There is no provision of the statute which seeks to confine the court in such a case to the record before the deputy commissioner or to the evidence which he has taken. The remedy which the statute makes available is not by an appeal or by a writ of certiorari for a review of his determination upon the record before him. The remedy is 'through injunction proceedings, mandatory or otherwise.' Sec. 21 (b). The question in the instant case is not whether the deputy commissioner has acted improperly or arbitrarily as shown by the record of his proceedings in the course of ad-

ministration in cases contemplated by the statute, but whether he has acted in a case to which the statute is inapplicable. By providing for injunction proceedings, the Congress evidently contemplated a suit as in equity, and in such a suit the complainant would have full opportunity to plead and prove either that the injury did not occur upon the navigable waters of the United States or that the relation of master and servant did not exist, and hence that the case lay outside the purview of the statute. As the question is one of the constitutional authority of the deputy commissioner as an administrative agency, the court is under no obligation to give weight to his proceedings pending the determination of that question. If the court finds that the facts existed which gave the deputy commissioner jurisdiction to pass upon the claim for compensation, the injunction will be denied insofar as these fundamental questions are concerned; if, on the contrary, the court is satisfied that the deputy commissioner had no jurisdiction of the proceedings before him, that determination will deprive them of their effectiveness for any purpose. We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it."

CONCLUSIONS

Since neither the findings and order of the Deputy Commissioner nor the order of the district court are in accordance with law or supported by evidence, both should be reversed in accordance with the rule promulgated in *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 91 L.ed. 1028, and the State of Washington permitted to compensate Markovich in accordance with its Compensation Act.

Particularly is such judicial action demanded in order to put an end to the growing practice of compensation shopping by injured workmen and to give needed finality to administrative orders of State Compensation Boards and likewise to prevent unseemly conflicts between state and federal jurisdictions.

Respectfully submitted,

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cific Insurance Co.*

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

WESTERN BOAT BUILDING COMPANY, a Partnership,
and UNITED PACIFIC INSURANCE COMPANY,
a Corporation,

Appellants,

vs.

J. J. O'LEARY, Deputy Commissioner, 14th Compensation
District, under the Longshoremen's and Harbor Workers'
Compensation Act, and ROBERT MARKOVICH,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE J. FRANK McLAUGHLIN, *Judge,*
Sitting by Assignment

BRIEF FOR APPELLEE J. J. O'LEARY

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J. J. O'LEARY

OFFICE AND POST OFFICE ADDRESS:
324 FEDERAL BUILDING
TACOMA 2, WASHINGTON

FILED

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

WESTERN BOAT BUILDING COMPANY, a Partnership,
and UNITED PACIFIC INSURANCE COMPANY,
a Corporation,

Appellants,

vs.

J. J. O'LEARY, Deputy Commissioner, 14th Compensation
District, under the Longshoremen's and Harbor Workers'
Compensation Act, and ROBERT MARKOVICH,

Appellees.

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BRIEF FOR APPELLEE J. J. O'LEARY

QUESTIONS PRESENTED
BY THE APPEAL

The principal questions involved in this action
appear to be:

1. Whether the locus of the injury was such as
to bring it within the jurisdiction of the Longshore-
men's Act?

2. What effect, if any, the payment of compensation under the Workmen's Compensation Laws of the State of Washington had upon the injured employee's rights under the Federal Law?

3. Were the plaintiffs (appellants) entitled to a trial de novo before the District Court upon the issue of whether the injury occurred upon the navigable waters of the United States.

STATEMENT THE CASE

This cause arises upon a petition to set aside as not in accordance with law, and to enjoin the enforcement thereof, a compensation order filed on March 20, 1951, by J. J. O'Leary, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, in which he awarded compensation to Robert Markovich, hereinafter called "the claimant," for disability due to an injury received on October 18, 1950, arising out of and in the course of his employment with the plaintiff Western Boat Building Company at Tacoma, Washington, at which time plaintiff United Pacific Insurance Company was the insurance carrier of the employer.

The deputy commissioner's compensation order complained of was issued pursuant to the provisions

of the Longshoremen's Act, and reads in part as follows:

"Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

"That on the 18th day of October, 1950, the claimant above named was in the employ of the employer above named at Tacoma, State of Washington, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act and that liability of the employer for compensation under the said Act, was insured by the United Pacific Insurance Company; that on said date the claimant herein, while performing service as a Fastener for the employer and engaged in work incidental to the repair of the tugboat EL SOL which was then located on a Marine railway at the yard of the employer, sustained personal injury resulting in his disability when, while walking alongside a lifeboat on the upper deck of said vessel, he lost his balance and fell over the side of the vessel, a distance of approximately 40 feet, in consequence of which he suffered a compression fracture of the first lumbar vertebra, multiple abrasions and contusions of shoulders and left ribs; that the marine railway on which the vessel was located is approximately 150 feet long and the lower portion of same extends into the water; that during the time the vessel was undergoing repairs on said marine railway, the stern of the vessel was partially submerged in the navi-

gable waters of Puget Sound at high tide; that the employment in which the claimant was engaged at the time of his injury was maritime in nature and that said injury occurred upon navigable waters of the United States and comes within the purview of the Longshoremen's and Harbor Workers' Compensation Act: that written notice of injury was not given within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice; that the employer furnished the claimant with medical treatment, etc., in accordance with the provisions of Section 7(a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to \$2,936.75; that as a result of the injury sustained the claimant was wholly disabled from October 19, 1950 to March 14, 1951, on which date he was still so disabled, and he is entitled to 21 weeks compensation at \$35.00 per week for such temporary total disability; that the accrued compensation for temporary total disability to March 14, 1951, inclusive, amounts to \$735.00; that the employer and insurance carrier have paid nothing to the claimant as compensation."

THE EVIDENCE

Before discussing the legal questions, it would appear desirable to summarize the evidence to show what claimant was doing when he was injured, to identify the place from which he fell, as well as the place where the fall ended.

ROBERT MARKOVICH, the claimant, testified in part as follows:

That he was 58 years of age at time of accident and employed by the Western Boat Building Company, and that his usual work was that of a fastener (Tr. 33); that the duties of a fastener are to drill holes for the bolts in planking and "anything to be fastened." (Tr. 33); that in the ordinary course of his duties as a fastener, he would have occasion to go out on boats that were on navigable water or on marine ways (Tr. 34); that he had done that frequently, that the employees went anywhere they were ordered to go, either when the boat is on the water or tied up at the dock (Tr. 34); that in the ordinary course of his employment he worked on ships on the water and on the marine railway, and on other ways; that the tug EL SOL was on the marine ways (Tr. 34), and that the marine railway runs down into the water about 100 or 150 feet (Tr. 35); that the tug had been placed on a cradle and taken out of the water and was standing on the marine railway at the time he was working on the tug, (Tr. 35); that at high tide part of the keel would still be in the water (Tr. 35); that the crew was still on the tug, eating and sleeping thereon (Tr. 36); that on his first day of work on the tug he was taking some ration boxes out of the lifeboats at the direction of Mr. Petrich (Tr. 36); that he went up to the top of the boat and was walking around there when he

fell (Tr. 37); that he had put his weight on the tank, jerked it a couple of times and it came loose (Tr. 37); that he turned around and started to walk back on a space eight or ten inches wide and stepped on a loose board which caused him to fall about 40 feet off the boat (Tr. 37); that he hit the scaffold in falling and landed partially in the water although the tide was going out (Tr. 38); that he was standing "just about midship" when he fell (Tr. 43); that after he landed he heard someone calling "Pull him out of the water". (Tr. 43).

Vern M. Stangland testified in part as follows: That he was the bookkeeper for the Western Boat Building Company (Tr. 47); that the company carried liability insurance under the terms of the Longshoremen's Act (Tr. 47); that all the workers in the yard, including the office, are covered (Tr. 47); that at high tide the bottom of the tug EL SOL would be partially covered by water on the marine railway at the time of the accident (Tr. 49); that the tug had been on the marine railway two to four days and the crew was on board (Tr. 49); that to the best of his recollection the boat was returned to the water the next day (Tr. 50); that the tug was approximately 136 feet in length and better than 200 tons (Tr. 51); that the marine rails project

out into the water and the boats are pulled "up on the dry dock" through the medium of an electric motor and winch (Tr. 56); that the bottom end of the dock is always in the water (Tr. 57); that the upper part of the cradle is out of water "when the boat is docked", that it can be run "clear out into the water so that it is submerged on the lower part". (Tr. 57); that they can either finish the boat completely "in the dock," or haul it up for cleaning and painting the bottoms (Tr. 57).

Karl Koch testified in part as follows: that he was employed by the Western Boat Building Company as a "fastener" (Tr. 52); that he was working on the "EL SOL" at the time of the accident (Tr. 53); that he heard a noise, went over, and saw Markovich "laying down in the water" (Tr. 53); that Markovich was lying in about a foot of water; that he had to go into the water and turn Markovich around "to get him on dry land" (Tr. 53); that he (Koch) frequently went out on boats in the stream to work on them as well as on the marine ways (Tr. 53); that Markovich had also done such work (Tr. 54); and that if the work can be done on the water the boats are not brought in (Tr. 54).

PERTINENT STATUTES

The pertinent portions of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424 33 U.S.C.A. 901 et seq.,) hereinafter called the "Longshoremen's Act", insofar as applicable to this appeal are as follows:

"Sec. 903. **COVERAGE.** (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through Workmen's Compensation proceedings may not validly be provided by State law."

"Sec. 919. *Procedure in Respect of Claims.* (a) * * * the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim."

"Sec. 920. *Presumptions.* In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary— (a) That the claim comes within the provisions of this chapter."

"Sec. 921. *Review of Compensation Orders.* * * * (b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings * * * instituted in the Federal district court * * *"

ARGUMENT

There are but two requirements to bring the injury of an employee injured in the course of his employment within the purview of the Longshoremen's Act. They are: (1) the employment must be maritime, and (2) the injury must occur "upon the navigable waters of the United States (including any dry dock)".

The maritime nature of claimant's employment, namely, repair of vessels, is not questioned by the appellants, (Appellants' Brief 8-9), and for good reason, it being a typically maritime employment.

North Pacific Steamship Co. v. Hall Bros. Co., 249 U.S. 119; *John Baizley Iron Works v. Span*, 281 U.S. 222, Cf. *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244.

Appellants, however, do contend that the injury did not occur at a jurisdictional locus within the purview of the Act. They argue that the injury due to a fall from the marine railway in this case was not an injury "upon navigable waters of the United States (including any dry dock)" within the meaning of the Act.

A. A MARINE RAILWAY IS A DRY DOCK
WITHIN THE MEANING OF SECTION
3(a) OF THE LONGSHOREMEN'S ACT.

In construing a statute, it is necessary to take into consideration its history and purpose. For a long time prior to the enactment of the Longshoremen's Act there had been considerable confusion and uncertainty as to whether the several states could provide a remedy for employees injured while engaged in employment in and about vessels, such as loading, unloading, refitting and repairing. In the years just preceding the enactment of the Longshoremen's Act, the United States Supreme Court by a series of decisions held that the states could not provide workmen's compensation benefits with respect to injuries sustained by persons engaged in maritime employment and that Congress could not constitutionally delegate authority to the States to provide said workmen's compensation benefits.

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); and *Washington v. Dawson & Co.*, 264 U. S. 219 (1924), in which latter case the court at page 227 said:

"Without doubt Congress has power to alter, amend, or revise the maritime law by statutes of

general application embodying its will and judgment. This power, we think would permit enactment of a general Employer's Liability Law or general provisions for compensating injured employees; but it may not be delegated to the several States."

Apparently in response to the suggestion contained in the opinion above quoted, Congress enacted the Longshoremen's Act in 1927.

Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1944).

The Senate report on such legislation states that "the purpose of this bill is to provide for compensation instead of liability for a class of employees commonly known as 'longshoremen'. These men are mainly employed in loading, unloading, refitting and repairing ships." Senate Report No. 973, 69th Congress, first session, Page 16.

By Section 3(a) Congress made the Act applicable to all injuries "occurring upon the navigable waters of the United States (including any dry dock)". It is well known that the form of dry dock known as a marine way or marine railway dry dock is the form generally used upon the navigable waters of the United States, particularly in the interior and Gulf States. They will be found at many of the sea-ports although at the latter places the graven dock

type is probably used to a greater extent for the largest vessels. According to the "Record of American and Foreign Shipping" of the American Bureau of Shipping, on January 1, 1932, there were 530 dry docks in the United States of which 268, or more than half, were marine railways. In view of the fact that marine railways are in the majority, it is reasonable to assume that Congress when using the expression "including any dry dock" in the Longshoremen's Act had in mind all forms of dry dock and intended to cover all and certainly not to exclude the majority.

In order to understand the function of a marine railway, it is necessary to refer to the class of structures within which it falls; namely, dry docks. A "dry dock" is a structure contrived for the purpose of taking ships out of the water in order to repair them. It may consist of a graven dry dock or a floating dry dock, from both of which the water is withdrawn, or it may consist of a structure with trackage such as a marine railway upon which a vessel is drawn for repairs. The fact that the Supreme Court had referred to a marine railway as a dry dock (*North Pacific Steamship Co. v. Hall Bros. Co.*, 249 U.S. 119 (1919)) was known to Congress when it used the term "any dry dock" in the Longshoremen's Act. The ultimate purpose of a dry dock is to withdraw a vessel from the water for the purpose of repairs and while the

type of structure used to perform this service may vary, the operation is essentially the same in each instance. The fact that one may be called a dry dock, another a graven dock, another a floating dock, and another a marine way or railway, does not change the general characteristics of the particular structure or the purpose it serves in its relation to maritime rights or obligations. Such was stated by Judge Woolley in his dissenting opinion in the case of *Norton v. Vesta Coal Company* 63 F. (2d) 165, (C.C.A. 3, 1933), in discussing the several types of dry docks:

“In these three types of docks there is no difference in purpose or use, or in their relation to maritime rights and obligations. All are concerned with maritime repairs. Each is an instrumentality in the same art. Their only difference is in the methods in which they function. When on a marine railway a vessel, licensed and engaged in commerce is taken high on the land for repairs, there is no question that the contract of labor and the work done upon her at the time are maritime.”

In the case of *North Pacific Steamship Co. v. Hall Bros. Co.*, 249 U.S. 119, where the contention was that a maritime lien did not apply because the repairs to the vessel were made on a marine railway and, therefore, not subject to Admiralty and Maritime jurisdiction, the court, on pages 123-129, with respect to question involved herein, said:

" * * * The Shipbuilding Company was the owner of a shipyard, marine railway, machine shops, and other equipment for building and repairing ships, situate upon and adjacent to the navigable waters of Puget Sound at Winslow, in the same state, and had in its employ numerous mechanics and laborers. Under these circumstances it was agreed between the parties that the Shipbuilding Company should tow the vessel from where she lay to the shipyard, haul her out as required upon the marine railway to a position on dry land adjacent to the machine shop, — the place being known as the "dry dock", and the hauling out being described as "docking," — and should furnish mechanics, laborers, and foremen as needed, who were to work with other men already in the employ of the Steamship Company, and under its superintendence; * * * At the time the contract was made, another vessel (the Archer) was upon the dry dock, and it was uncertain how soon she could be returned to the water. It was understood that the Yucatan should be hauled out as soon as the Archer came off, should remain upon the dry dock only during such part of the work as required her to be in that position, and at other times should lie in the water alongside the plant. * * *

"The vessel was docked and repaired in the manner contemplated by the agreement; she was brought to the shipyard on the 27th of May, and lay in the water alongside of the dock there until the 17th of June, during which time upper decks and beams were put in and other work of a character that could be done as well while she was afloat as in the dry dock. On June 17 she was hauled out and remained in dry dock for about two weeks while her bottom plates were renewed.

* * *

"The question in dispute is whether a claim thus

grounded is the subject of admiralty jurisdiction; appellant's contention being that the contract, or at least an essential part of it, was for the use by appellant of libellant's marine railway shipyard, equipment, and laborers in such manner as appellant might choose to employ them, and that it called for the performance of no maritime service by libellant.

* * * * *

"In *The Robert W. Parsons* (*Perry v. Haines*) 191 U.S. 17, 33, 34, 48 L. ed. 73, 80, 81, 24 Sup. Ct. Rep. 8, it was held that the admiralty jurisdiction extended to an action for repairs put upon a vessel while in drydock; but the question whether this would apply to a vessel hauled up on land for repairs was reserved, the language of the court, by Mr. Justice Brown, being: 'Had the vessel been hauled up by ways upon the land and there repaired, a different question might have been presented, as to which we express no opinion; but as all serious repairs upon the hulls of vessels are made in dry dock, the proposition that such repairs are made on land would practically deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs'.

"* * * In *Peyroux v. Howard*, 7 Pet. 324, 327, 341, 8 L. ed. 700, 701, 706, the vessel, requiring repairs below the water line as well as above, was to be and in fact was hauled up out of the water; and it was held that the contract for materials furnished and work performed in repairing her under these circumstances was a maritime contract. We think the same rule must be applied to the case before us; that the doubt intimated in *The Robert W. Parsons*, *supra*, must be laid aside; and that there is no difference in character as to repairs made upon the hull of a

vessel dependent upon whether they are made while she is afloat, while in dry dock, or while hauled up by ways upon land. The nature of the service is identical in the several cases, and the admiralty jurisdiction extends to all.

“This is recognized by the Act of Congress of June 23, 1910 (Chap. 373, 36 Stat. at L. 604, Comp. Stat. 1916, Sec. 7700), which declares that ‘any person furnishing repairs, supplies, or other necessities, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic,’ upon the order of a proper person, shall have a maritime lien upon the vessel.”

It is submitted that the term “any dry dock”, as used in the Longshoremen’s Act, includes a marine way or a marine railway as well as a graven dock, floating dry dock, or structure of a similar design used for similar purposes.

On three occasions the question whether an injury upon a marine railway is an injury upon “any dry dock” within the meaning of Section 3(a) of the Longshoremen’s Act has been decided by a United States Court of Appeals. In *Norton v. Vesta Coal Company*, 63 F. (2d) 165 (C.C.A. 3, 1933), by a divided court, it was held that the term “any dry dock” did not include a marine railway. In *Continental Casualty Company v. Lawson*, 64 F. (2d) 802 (C. C. A. 5, 1933), also by a divided court, it was held that an injury to an employee upon a marine railway

comes within the term "any dry dock", the court, on pages 804-805, stating in part:

"It was within the power of Congress to extend to employees working on marine railways the same right to compensation for injury received in the course of their employment that it admittedly has provided for employees working on floating and graven dry docks. Indeed, in *North Pacific Steamship Co. v. Hall Brothers*, 249 U.S. 119, 39 S.Ct. 221, 63 L. Ed. 510, a marine railway in a shipyard was referred to as a dry dock, and it was said that the nature of the service was the same whether repairs were made while the vessel was afloat, or in dry dock, or hauled up on a marine railway. The doubt previously intimated in *The Robert W. Parsons*, 191 U.S. 17, at pages 33 and 34, 24 S.Ct. 8, 48 L. Ed. 73, was there resolved in favor of the admiralty jurisdiction over marine railways in cases depending upon contract. In *State Industrial Commission of State of New York v. Nordenholt Corp.*, 259 U.S. 263, 42 S.Ct. 473, 66 L.Ed. 933, 25 A.L.R. 1013, it was said that an award under a state compensation law is not made on the theory that a tort has been committed, but that the law under which such an award is made is read into and becomes a part of the contract of employment between employer and employee. And the same is true of an award made pursuant to the act under consideration, which 'within its sphere * * * was designed to accomplish the same general purpose as the Workmen's Compensation Laws of the states.' *Crowell v. Benson*, 285 U.S. 22, 40, 52 S.Ct. 285, 288, 76 L. Ed. 598. * * *

In our opinion it was not the intention of Congress to provide compensation for harbor workers only while they were working on ships that had been placed on floating or graven docks and

to deny compensation if the same employees happened to be repairing a vessel on a marine railway. Such workmen might have been engaged on the same day in all three classes of work, since it is not unusual in a large shipyard for employers to use all three methods of taking ships out of the water for the purpose of repairing them during the same day or even at the same time. The act does not undertake to provide compensation for injuries occurring on the ordinary dock or wharf used in loading and unloading cargo, doubtless because in the opinion of Congress, either this kind of dock, being an extension of the land, was exclusively within the jurisdiction of the states, *Cleveland Terminal & V. Co. v. Cleveland S. S. Co.*, 208 U.S. 316, 28 S.Ct. 414, 52, L. Ed. 508, 13 Ann. Cas. 1215; *State Industrial Commission of State of New York v. Nordenholt Corp.*, supra; *Smith v. Taylor* 276 U.S. 179, 48 S.Ct. 228, 72, L. Ed. 520; or because the Act would not apply to most cases of injury to longshoremen who usually are employed to work on the dock or wharf not by the shipowners but by independent contracting stevedores. The use of the phrase 'including any dry dock' in Section 3 discloses also an intention to exclude the ordinary cargo dock or wharf; to distinguish between the making of repairs to ships and the handling of cargo on shore; to assume jurisdiction over the former but not over the latter class of work. * * *."

This decision was cited with approval by the fourth circuit. See *Travelers Insurance Company v. Branham*, 136 F. (2d) 873, 875 (1943).

The court's assertion that it was within the power of Congress to extend to the employees work-

ing on marine railways the same remedy which it has extended to employees working on floating and graven docks was given approval by implication recently by the United States Supreme Court in *O'Donnell v. Great Lakes Dredge and Dock Company*, 318 U.S. 36 (1943), where the court sustained the right of a seaman to recover under the Jones Act for an injury which occurred upon land. Compare also *Aguilar v. Standard Oil Company of New Jersey*, 318 U.S. 724 (1943); *Strika v. Netherlands Ministry of Traffic*, 185 F. (2d) 555 (C.A. 2, 1950).

In *Maryland Casualty Company v. Lawson*, 101 F. (2d) 732 (C.C.A. 5, 1939), it was again held, this time by a unanimous court, that the term "any dry dock" in the Longshoremen's Act includes a marine railway. The court at pages 733-734 said:

"Appellants contend that a marine railway is not a dry dock within the meaning of the law, relying upon *Norton v. Vesta Coal Co.*, 3 Cir., 63 F. (2d) 165, and *Rohlfs v. Dept. of Labor and Industries*, 190 Wash. 566, 69 P. (2d) 817, which are in point but not controlling. We held to the contrary in *Continental Casualty Co. v. Lawson*, 5 Cir., 64 F. (2d) 802, and decided that a marine railway is to be considered a dry dock within the meaning of the statute. Our decision finds support in *Butler v. Robins Dry Dock & Repair Co.*, 240 N.Y. 23, 147 N.E. 235, in which it was held that a workman injured while engaged in repairing a vessel in a graving dock

was constructively on navigable waters when the accident occurred.

“Technically, a dry dock is a watertight basin which after pumping out allows examination and work upon the bottom of a vessel. A graving dock, except for details of construction, is the same. A floating dock receives a vessel when the dock is submerged, after which the watertight compartments of the dock are pumped out and the buoyancy of the dock raises the vessel. A marine railway is an inclined structure at the water’s edge which extends below the water. It carries a cradle which moves on rollers or wheels. The cradle runs below the water and receives the vessel which is then hauled out. Bradford, Glossary of Sea Terms, ‘Dry Dock’ ‘Railway.’

“In enacting the Longshoremen’s and Harbor Workers’ Compensation Act it was clearly the intention of Congress to give the same rights and remedies to those employed in work of a maritime nature as are enjoyed by other workers under the provisions of state workmen’s compensation acts. The act is to be liberally construed to effect its purpose. *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 409, 52 S. Ct. 187, 76 L. Ed. 366.

“In construing the act we are not bound by technical definitions but must interpret it by giving to the words used their ordinary meaning. Courts of admiralty may take notice of terms in general use in maritime affairs. *Brown v. Piper*, 91 U.S. 37, 23 L. Ed. 200. In nautical parlance ‘dry dock,’ ‘floating dock’ and ‘marine railway’ are interchangeable terms. Necessarily, all are located on navigable waters and used for exactly the same purposes, i.e., to raise a ship out of the water to permit examination and repairs to her hull which are impossible while she is afloat. A

ship's master speaks of 'dry docking' his vessel regardless of which method is to be used. That the words have a common meaning is illustrated by this case. Although operating a marine railway, appellant calls itself a dry dock.

"There are few dry docks, technically considered, in the United States. Floating docks or marine railways or both are to be found at every seaport. It must be presumed that Congress intended to protect the great majority of laborers employed on floating docks and marine railways as well as the comparatively few workmen employed on what are to be technically considered dry docks. We entertain no doubt that in extending the law to cover 'any dry dock' Congress intended to include marine railways. Cf. *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 47 S.Ct. 19, 71 L. Ed. 157, and *Warner v. Goltra*, 293 U.S. 155, 55 S. Ct. 46, 79 L. Ed. 254."

It is therefore respectfully submitted that the history and purpose of the Longshoremen's Act would seem to warrant the conclusion that Congress intended that said Act should cover workmen who were employed in repairing vessels which are temporarily drawn upon marine railways and that the later decisions in *Continental Casualty Company v. Lawson*, supra, and *Maryland Casualty Company v. Lawson*, supra, are more in keeping with modern concepts of Admiralty jurisdiction than the earlier decision of *Norton v. Vesta Coal Company*, supra.

It might be added that the Government maintains

its position that the Longshoremen's Act covers injuries which occur on a marine railway notwithstanding the inference which the appellants are pleased to draw (Appellant's Brief 15, 16) from the statement of the United States Supreme Court when it dismissed a writ of certiorari in *Norton v. Vesta Coal Co.*, supra, upon the ground that "it appears that the Government has now adopted the conclusion that the decision below is correct and no substantial controversy is presented at the bar of this court". The Government's position is clearly indicated by its two successful appeals which it prosecuted on the same question in the later cases of *Continental Casualty Co. v. Lawson*, supra, and *Maryland Casualty Company v. Lawson*, supra.

If it be necessary to distinguish the Norton case, supra, from the instant case, it might be stated that in the Norton case after the vessel had been raised from the waters of the Monongahela River, the cradles of the marine railway were removed and the boat was blocked up about 75 feet from the water's edge, whereas in the instant case, the tug was resting on the marine railway and part of the tug was in the water, and when the employee fell from the tug he fell into the water.

This distinction in no wise detracts from the

convincing reasoning expressed by Judge Woolley as to the intention of Congress to cover injuries occurring on marine railways.

B. CLAIMANT'S EMPLOYMENT ENTIRELY MARITIME AND NOT VALIDLY COVERED BY STATE COMPENSATION ACT.

1. *Local Concern Doctrine No Longer Applicable.*

With the advent of the State Workmen's Compensation law, came the conflict between Federal and State jurisdictions with respect to injuries sustained by workers along the shore (longshoremen) and harbor workers. Beginning with *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) and followed by *Knickerbocker Ice. Co. v. Stewart*, 253 U.S. 149, and *Washington v. Dawson and Company*, 264 U.S. 219, the Supreme Court held that the states could not apply State Workmen's Compensation laws to injuries sustained by employees which occur upon the navigable waters.

See report of Senate Committee on the Judiciary, accompanying bill enacted as Longshoremen's Act, S.R. 973, 69th Congress, 1st Session, Page 16.

Between the Jensen decision in 1917 and the enactment of the Longshoremen's Act in 1927, there grew up what was known as the "local concern" doc-

trine. It was a "stopgap" accepted by the Supreme Court for the purpose of granting relief to those employees injured on navigable waters who would otherwise have had no remedy. It permitted state law to grant the remedy in the form of workmen's compensation where it would not interfere with the general maritime law. Among such cases were *Sultan Railway Co. v. Department of Labor* 277 U.S. 135; *Grant-Smith-Porter Co. v. Rohde*, 257 U.S. 469; *Millers' Indemnity Underwriters v. Braud* 270 U.S. 59; *Alaska Packers Association v. Industrial Commission of California*, 276 U.S. 467. Each of the cases, it should be noted, arose prior to enactment of the Longshoremen's Act.

The Grant-Smith-Porter case, *supra*, sometimes referred to as the Rohde case, involved work on an incompleated vessel, which work was clearly non-maritime, under long judicial history.

The *Millers' Indemnity Underwriters v. Braud* case, *supra*, involved work of a diver in connection with removing timbers from an abandoned set of ways once used for launching ships. While this work had some maritime flavor, it did not constitute maritime employment. In distinguishing the Braud case in the later case of the *London Guarantee and Accident Company v. Industrial Accident Commission of California*, 279 U.S. 109, the Supreme Court specifically

stated that the employment in the Braud case "was not maritime". In the Braud case the deceased employee's representative was allowed to recover under the Texas Workmen's Compensation law.

In the case of *Alaska Packers Association v. Industrial Accident Commission*, supra, a person engaged in general work in and about a cannery was injured while standing upon the shore and endeavoring to push a stranded fishing boat into navigable waters for the purpose of floating it to a nearby dock, where it was to be lifted out and stored for the winter. This work was non-maritime and not within the exclusive admiralty jurisdiction. The employee was allowed to recover under the California Workmen's Compensation law.

In *Sultan Railway Co. v. Department of Labor and Industries of the State of Washington*, supra, the employee was engaged in assembling saw logs in booms and the breaking up of booms, which had been towed on a river to a sawmill. An award for injuries under the Washington Workmen's Compensation law was sustained in this case. The employment connected with the local operation of the sawmill was likewise non-maritime.

In *London Guarantee and Accident Company, Ltd. v. Industrial Accident Commission of California*,

supra, the Supreme Court, speaking through Chief Justice Taft, stated specifically that the employment in the Rohde case, the Alaska case, Braud case, and Sultan Company case was non-maritime. It will thus be seen that in the cases in which the Supreme Court has applied the local concern doctrine the employment was not maritime. If, therefore, the contention be sustained that the employment in the instant case was maritime, it must follow that the local concern doctrine has no application.

See Vol. 1, Am. Jur. Admiralty, Sec. 50, P. 576.

As will be seen from the summary of the foregoing decisions of the Supreme Court, the so-called doctrine of local concern arose out of a series of decisions of that court upon cases which arose prior to the passage of the Longshoremen's Act and involved conflict between Federal Maritime jurisdiction and the State jurisdiction under Workmen's Compensation laws. Under this doctrine the court apparently sought to concede to the states the right to afford relief through their own compensation statutes in cases where the injury arose in connection with work which was of merely local concern, there being then no Federal statute providing such relief; but just as in the field of interstate transportation by railroad, the jurisdiction which the states had exer-

cised to afford relief in this field during the absence of Federal remedial legislation, disappeared upon the passage of the Federal Employers' Liability Act.

See *New York Central Railroad Company v. Winfield*, 244 U.S. 147.

Similarly, on the passage of the Longshoremen's Act any jurisdiction exercised by the states to afford in certain (very likely borderline) cases a measure of relief as a matter of local concern, likewise disappeared. The Federal Government, although it may have acquiesced in the exercise by the States of jurisdiction in an unoccupied field of Federal jurisdiction, completely ousted whatever State jurisdiction was presumed to exist when it finally entered that field and exercised its own jurisdiction therein through the Longshoremen's Act. None of the cases decided by the Supreme Court, and usually cited in support of the so-called local concern doctrine, involved a fact situation which would have come within the Longshoremen's Act, if it had then been in existence. The only case arising since the Longshoremen's Act became effective in which the Supreme Court had occasion to pass upon the question of the existence of State jurisdiction as a matter of local concern within the field now covered by the Longshoremen's Act is the case of *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244

(1941), *supra*, and in that case the Supreme Court refused to apply such doctrine, holding that the death of the employee came within the purview of the Longshoremen's Act and not within the purview of the State Compensation law.

The local concern doctrine was evolved only to supplement the long standing test of jurisdiction in admiralty in tort cases, namely, locus, by inquiring not only where the injury occurred but also what the employee was doing, that is, if he was engaged in maritime employment. Before that doctrine was evolved the mere fact of injury on navigable waters was sufficient to establish jurisdiction in the Federal Admiralty Courts. In *Imbroke v. Hamburg-American Steam Packet Co.*, 190 F. 229, (Md. 1911) the court at Page 233, said:

"The Supreme Court has said 'Every species of tort, however occurring and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.' The *Plymouth*, 3 Wall. 37, 18 L. Ed. 125. This language was used 45 years ago. The Supreme Court has never intimated any dissatisfaction with it."

The *Imbroke* case was affirmed by the Court of Appeals, 4th Circuit sub nom. *Atlantic Transport*

Co. of West Virginia v. Imbrovek, 193 F. 1019 in a memorandum decision, which stated:

“We find ourselves in full accord with the views of the court below, on all questions raised by the assignments of error.”

When the case reached the U. S. Supreme Court, 234 U.S. 52, the latter court in affirming the judgment of the court below, quoted at Page 59 of its opinion from the early decision above mentioned:

“The jurisdiction of the Admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters. The vessel itself was unimportant. * * * The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality — the high seas or navigable waters where it occurred. ‘Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable water, is of admiralty cognizance’.”

Finally, in *London Guarantee and Accident Co. v. Industrial Commission*, 279 U.S. 109 (1928) the court, at Page 123, said:

“Objection is made that the deceased here lost his life by drowning when he was not on a vessel in the navigation of which he had been employed as a seaman. This is immaterial. He was lost in navigable waters. He was engaged in attempting to moor and to draw into a safe place the vessel with relation to which he was em-

ployed. It is clearly established that the jurisdiction of the admiralty over a maritime tort does not depend upon the wrong having been committed on board a vessel but rather upon its having been committed upon the high seas or other navigable waters. *The Plymouth*, 3 Wall. 20, *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 59, 60."

See also *Merritt-Chapman & Scott v. Bassett*, 50 F. Supp. 488 (1943), where the employee was injured while repairing a lighthouse.

Since the enactment of the Longshoremen's Act, the reason for the doctrine and the doctrine itself have disappeared so far as cases coming within the purview of the Longshoremen's Act are concerned. In the case of *Parker v. Motor Boat Sales, Inc.*, supra, the Supreme Court held in effect that in all cases of Admiralty and Maritime jurisdiction, federal jurisdiction is exclusive and state action forbidden. The decision in the Parker case was anticipated in the case of *Continental Casualty Company v. Lawson*, 64 F. (2d) 802 (C.C.A. 5, 1933), where the court at Page 805, said:

"The elaborate provisions of the Act, viewed in the light of prior Congressional legislation as interpreted by the Supreme Court, leaves no room for doubt, as it appears to us, that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter. * * * State compensation laws and this compensation law of Congress are mutually ex-

clusive of each other. The existence of the Act of 1927 must be taken into consideration and given effect in determining whether under Section 3 (33 U.S.C.A. Sec. 903) thereof the compensation laws of the states are valid and applicable; for state laws cannot now validly apply to a subject-matter over which Congress has exercised its exclusive jurisdiction."

See also *Moore v. Christiensen S.S. Co.*, 53 F. (2d) 299 (C.C.A. 5, 1931).

The case of the *DeBardeleben Coal Corp. v. Henderson*, 142 F. (2d) 481 (C.A. 5, 1944) fully discusses the exclusiveness of Federal jurisdiction in maritime cases before and after the period of the "local concern" doctrine. At Page 483 of that decision, the court said:

"As the Parker case pointed out, it is not at all necessary now to redetermine the correctness vel non of the Jensen case or of any of the brood, hatched from it, which, teetering and wavering on the line the Jensen case had drawn between State and Federal jurisdiction, drew it now on this, and now on the other, side as hard cases piled up to make bad law worse. It is sufficient to say that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority and that the provision 'if recovery * * * may not validly be provided by State law' was placed in the Act not as a relinquishment of any part of the field which Congress could validly occupy but only to save the Act from judicial condemnation by making it clear that it did not intend to legislate beyond its constitutional powers. Having in mind the confused and confusing mass of quasi legisla-

tive decisions which, as such decisions always tend to do, had rendered the law almost hopelessly uncertain, this provision was inserted to avoid, not to provide, a new basis for further judicial trimming. In the application of the act, therefore, the broadest ground it permits of should be taken. No ground should be yielded to state jurisdiction in cases falling within the principle of the Jensen case merely because the Supreme Court, before the Federal Compensation Law went into effect, did here a little, there a little, chip and whittle Jensen down in the mass of conflicting and contradictory decisions in which it advanced and applied the 'local concern' doctrine to save to employees injured on navigable waters, and other wise remediless, the remedies State Compensation laws afforded them. In short, the Federal Compensation Law now in effect, the judicial tergiversations which went on before its passage no longer have point. This is what we held in the Lawson case, what the Supreme Court held in the Parker case, *supra*. We adhere to that holding. The judgment was right. It is affirmed."

In *Travelers Insurance Co. v. McManigal*, 139 F. (2d) 949 (C.A. 4, 1944), on Page 953 of the reported decision, the court, while decrying the doubts which have beset the courts and litigants in this field of law through the uncertain limits of the spurious doctrine of local concern, in no uncertainty concluded:

"But if the conclusions we have reached in this case with respect to the locality of the injury and the nature of the employment of the deceased are valid, there is no room for the application of the rule announced in cases of the Rohde class."

2. *The Payment of Compensation Purportedly Under the State Law Did Not Oust Federal Jurisdiction.*

The appellants contend at Page 30 of their brief that the State law provided claimant's "exclusive remedy for compensation". That would be true if there were no other jurisdiction or remedies than those afforded by the State. Certainly, it could not be contended that the State intended to immunize its workers, regardless of employment, from any form of Federal compensation in the event of injury.

Even if, contrary to what appellees have herein expressed, there could be concurrent jurisdiction between a State and the Federal Government with reference to an injury which arose out of maritime employment, action under the State law would not oust Federal jurisdiction.

United States Fidelity and Guaranty Company v. Lawson, 15 F. Supp. 116 (Ga. 1936); *Great Lakes Dredge and Dock Co. v. Brown*, 47 F. (2d) 265 (Illinois, 1930).

In *Lawson v. Standard Dredging Corp.* 134 F. (2d) 771 (C.A. 5, 1943) at Page 772 of the opinion, the court said:

"The employees being within the coverage of the Federal Act, provisions of the employment contracts providing for waiver of benefits and the

payment of other and different benefits under the State law are invalid. 33 U.S.C.A., Sec. 915(b)."

The following cases reveal the effect assigned by the court to the acceptance of State compensation, where injury was beyond State jurisdiction:

In *Kibadeaux v. Standard Dredging Co.*, 81 F. (2d) 670 (C.A. 5), where the claim was filed under Texas Compensation Act and acceptance of payments thereunder was without award it was held not to estop recovery of damages by a libel in admiralty, employee's injury being beyond jurisdiction of the State Commission, and certiorari was denied, 299 U.S. 549.

In *Hoffman v. New York, etc. Railroad Co.*, 74 F. (2d) 227 (C.C.A. 2), where the agreement for compensation was approved by Connecticut Compensation Commission, and payments thereunder made, it was held no bar to an action under the Federal Employers' Liability Act, with the injury outside the Commission's jurisdiction, and certiorari was denied, 294, U.S. 715.

In *Gahagan Construction Corporation v. Armao*, 165 F. (2d) 301 (C.A. 1, 1948) where as in the instant case the employee had accepted compensation benefits under the State Compensation Law (Massa-

chusetts) and had subsequently filed suit in Federal Court under the Jones Act, the court said:

“We do not think the mere receipt of payments under the State Act is sufficient to bind the plaintiff here and prevent his pursuing other remedies he might have on either the law or admiralty side of the court.”

In *Kantleberg v. G. M. Standifer*, 7 F. (2d) 922 (Oregon 1920), where the injured employee accepted benefits under the Oregon Compensation Act, the effect was held not prejudicial to employee's rights under Federal law, and the same was held true in *Massachusetts Bonding & Insurance Co. v. Lawson*, 149 F. (2d) 853 (C.A. 5, 1945), where the employee accepted compensation benefits and signed a settlement receipt under the Florida State Law and subsequently filed a claim under the Longshoremen's Act, as in the instant case.

Appellants in their brief at Pages 31-33 argue the full faith and credit clause where there was a question as to compensation to the injured from the several states, but appellees fail to see any application in the instant case.

One view is that an acceptance of compensation under a State Compensation Law is that it is a settlement only of the rights, if any, under the State law, but does not settle the liability of employers to em-

ployees engaged in interstate or foreign commerce or in maritime employment, not within the State law.

Hoffman v. N. Y., N. H. & H. R. Co., 74 F. (2d) 227, 231, (C.A. 2, 1934);

Industrial Commission v. McCartin, 330 U.S. 622.

In the last cited case, the court said that in the absence of "unmistakable language" a statute should not be construed as to "cut off an employee's right to sue under other legislation passed for his benefit".

While appellants might discern a leeway under such decisions for "compensation shopping", (Appellants' Brief 35), nevertheless, to appellees, the maintenance of such rights appears far more preferable to the "short changing" in compensation which otherwise might inure to appellants' financial and unearned benefits if human rights were not so protected.

It does not appear in good taste for the appellants to accuse claimant of "compensation shopping" when it was at their insistence that the State compensation was secured. (Tr. 70-72).

It appears from the record that the payment of State compensation to claimant was the result of efforts of the appellants rather than the result of the mere filing of any claim on behalf of the claimant. This is borne out by the letter of the District Super-

visor (Tr. 69), and the report of the inspector for the Department of Labor and Industries, at the Tacoma Branch, (Tr. 64-65), under assignment dated November 22, 1950, in which it is stated:

“After investigating the accident to Robert Markovich at the Western Boat Building Company on October 18, 1950, I find it happened as reported on claim slip, and the boat El Sol was still in commission with the crew working days. The boat was on the marine ways at the company plant at E. 11th St., Tacoma. In my opinion, this is a case for the Harbor Workers’ Compensation as we have no jurisdiction over boats in commission.”

This report might certainly have furnished proper basis for a decision in accordance therewith, and been so accepted by claimant, but for the insistence of the appellants by and through their counsel who under date of November 28, 1950, wrote to the department insisting that compensation should be made under the State compensation law, (Tr. 70-72), and it was not until after receipt of this letter from appellants’ attorneys that the department voluntarily and without any communication from the claimant made the payments to which appellants refer and upon which appellants contend the claimant is estopped from claiming any benefits under the Longshoremen’s Act. (See Appellants’ Brief, page 30).

In view of the circumstances under which vol-

untary payments of state compensation were made, we cannot agree with appellants' contention that such worked an estoppel against claimant's application herein for federal relief.

See *Kibadeaux v. Standard Dredging Co.*, *supra*; and *Massachusetts Bonding & Insurance Co. v. Lawson*, *supra*.

Again, the full faith and credit clause of the Constitution which appellants have seen fit to interject into the issues in this case is not applicable in this instance where there is involved the question of Federal versus State jurisdiction.

United States Constitution, Art. IV, Section 1.

When the States in Article III, Section 2 of the Constitution of the United States extended the judicial power of the United States "to all cases of admiralty and maritime jurisdiction" and in Article VI of the same instrument provided that "this Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land and the judges in every state shall be bounded thereby, anything in the Constitution or Laws of any state notwithstanding," it was not intended that a Federal law relating to a maritime injury and providing an exclusive remedy should be nullified by an award of a state commission under

state law. Moreover, there was no specific adjudication by the Washington Commission upon the issue whether the Federal or State compensation law was applicable, so that in any event that issue is not res adjudicata. *Hoffman v. N. Y., N. H. & H. R. Co.*, 74 F. (2d) 227, 230 (C.A. 2, 1934, cert. den. 294 U.S. 715; *Bretsky v. Lehigh Valley R.R. Co.*, 156 F. (2d) 594 (C.A. 2, 1946).

It should, therefore, be clear that the payments here in question and so made were not res judicata and did not have the effect of a "judgment" under Washington law. In brief, an award of compensation is not a judgment. *Lane v. Industrial Accident Commission*, 54 F. (2d) 338.

Aside from the foregoing consideration, it may be observed that Section 5 of the Longshoremen's Act, 33 U.S.C.A., Sec. 905, provides that the liability of an employer for an injury which comes within the provisions of the Longshoremen's Act shall be "exclusive and in place of all other liability". And, in addition, Section 16 of said Act, 33 U.S.C.A., Sec. 916, provides that no assignment or release except as provided in said Act shall be valid. The acceptance, therefore, of smaller compensation benefits under the state law could not operate as a bar to the rights under the Federal law.

3. "Twilight Zone" Theory Not Applicable.

Appellants appear to be of the opinion that *Davis v. Department of Labor and Industries*, 317 U.S. 249, changed jurisdictional concepts to the extent that they consider the court there held that in cases of apparent conflict between State and Federal jurisdiction, the state may assume jurisdiction of the claim. (Appellants' Brief, pages 23-24). This is an inaccurate view. In the *Davis* case the employee was engaged in dismantling a bridge spanning a river (a non-maritime employment). At the time of injury, in connection with that employment he was standing upon a barge helping to load steel which had been cut from the bridge, (a maritime employment). Depending upon the elements stressed by the employee before a State or Federal Tribunal, jurisdiction in either tribunal could be sustained. Here the employee applied to the state tribunal because of the non-maritime elements in his employment as dismantler of a bridge. He could have gone before the Federal Tribunal and shown that he was a loader of a barge and thus rested upon the maritime elements. In that case, after reviewing the history leading to the enactment of the Longshoremen's Act, and calling attention to the apparently insurmountable difficulty in fixing the dividing line between Federal and State

jurisdiction, the Court stated that there was undoubtedly a "twilight zone", composed of cases where the facts do not bring them clearly within either the Federal or the State jurisdiction. In such circumstances the court said that it would not interfere with the determination of the agency charged with the responsibility of fact finding and of determining jurisdiction. It stated that it would reject "only in cases of apparent error". Such, however, is a far cry from stating that Federal jurisdiction is ousted (in a case in which the deputy commissioner determines that he has jurisdiction) by a previous determination of a state agency that it has jurisdiction. In fact, the very contrary would seem to be a proper deduction from the Davis case for the following reason that although the appeal in the Davis case was from a determination by a state agency, the court at page 256, stated:

"Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There, we are aided by the provision of the federal act, 33 U.S.C., Sec. 920, which provides that, in proceedings under that act, jurisdiction is to be 'presumed, in the absence of substantial evidence to the contrary'. Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight

and will be rejected only in cases of apparent error.”

To the same effect, see *Travelers Insurance Co. v. McManigal*, *supra*, and *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947).

The view above expressed would mean, given the presumption of Federal jurisdiction, plus a finding of jurisdiction by the deputy commissioner in a case where the employee is injured while repairing a vessel, (a clearly maritime employment), at a place within admiralty jurisdiction (whether viewed from the fact that the injury occurred on the marine railway or in the water where he fell), there is no “apparent error” and the deputy commissioner’s conclusion should not be rejected.

The Court emphasized in the Davis case (page 258) that “the federal authorities have taken no action under the Longshoremen’s Act.” The court did not state or intimate in its opinion that the deputy commissioner’s jurisdiction under the Federal law is ousted where the state makes the first determination. The entire portent of the opinion is to the contrary. As we have hereinbefore contended in citing a list of authorities, federal jurisdiction is not ousted by the assumption of jurisdiction by the state. The most that can be said is that in these “twilight zone”

cases, if payment should happen to have been made under the state law, such payment may be credited against an award under the Federal statute. *Lawson v. Standard Dredging Corporation*, 134 F. (2d) 771, 772, (C.A. 5, 1943). This is similar to the practice uniformly followed where an injured employee may have concurrent rights under the compensation laws of two separate states. *Industrial Indemnity Exchange v. Industrial Accident Commission*, 182 P. (2d) 309, (Cal. 1947); and *McLaughlin's* case, 274 Mass. 217, 174 N.E. 338. See also in this respect the annotations and cases cited in 101 A.L.R. 1445 and 150 A.L.R. 432.

The case of *Cook v. Minneapolis Bridge Construction Company*, 43 N.W. (2d) 792, (Minn. 1950) appears to be the latest decision concerning an employee who has possible rights under two statutes for the same injury. It fully reviews the subject. Whatever salutary effect the Davis case may have upon resolving the confusion relating to state and federal jurisdiction in injury cases, it should not be misconstrued as holding that an employee who has a right under a Federal statute can be deprived of that right merely by the assumption of jurisdiction by a state tribunal.

C. MOTION FOR TRIAL DE NOVO PROPERLY DENIED.

Appellants argue that the District Court erred in denying to them "a de novo review of the question of whether Markovich was injured on Navigable waters". Appellants waited until the day of trial to interpose their motion for trial de novo, and the decision of that court thereon, as found in the order of dismissal (Tr. 22-25), is in pertinent part, as follows:

" * * *, and the plaintiffs having interposed their motion for trial de novo upon the question of difference between a marine railway and the term "any dry dock" and if intervenor was injured on navigable waters of the United States, within the meaning of the Longshoremen's and Harbor Workers' Act, *with the offer of expert testimony thereon*, on the ground that the same involved a jurisdictional fact and was open to review, and the court having received the memorandum of the deputy commissioner thereon and heard and considered the arguments of counsel, and it appearing to the court that evidence upon the alleged question of jurisdictional fact has been fully and completely presented before the deputy commissioner and that the plaintiffs do not allege that they have newly discovered evidence or different evidence to present to the court, nor do plaintiffs advance any other valid reason why there should be a new record, and it also appearing that such matter of trial de novo is within the discretion of the court, and the court having for such reasons denied the motion therefor, * * * proceeded to hear and determine this matter upon the transcript of the

record of hearing before the deputy commissioner herein filed * * *." (Emphasis ours.)

Appellants in the court below as well as here rely upon the case of *Crowell v. Benson*, 285 U.S. 22 in seeking trial de novo in proceedings under the Longshoremen's Act, in which case the court, three judges dissenting held that the lower court properly could permit a trial de novo upon the question there at issue of whether the relation of master and servant existed. An analysis of that case and its import and effect requires a consideration of what preceded it, the surrounding circumstances and what has happened since. As hereinbefore stated, prior to the enactment of the Longshoremen's Act the United States Supreme Court in several cases had held that the states did not have authority and Congress could not under the Constitution delegate to them the right to legislate with reference to compensation for employees injured while engaged in maritime employment. That right was considered to belong exclusively to Congress: *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 217; *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164; *Washington v. Dawson & Co.*, 264 U.S. 219, 227. It was for these employees, longshoremen and harbor workers that the Longshoremen's Act was passed. *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 250. When the Longshoremen's

Act was passed (1927) and when *Crowell v. Benson* was decided (1932) review procedure affecting administrative bodies exercising quasi-judicial functions had not fully been developed. Quasi-judicial determinations by administrative officers were then relatively new, and a new concept of public administrative law was in the making. To have legal questions decided through the exercise of quasi-judicial functions by an administrator was still an innovation.

Crowell v. Benson, supra, held, in effect, that findings of fact of the deputy commissioner are final and conclusive except as to those facts which the court variously labeled basic, fundamental or jurisdictional; as to these, the Supreme Court said that the reviewing court could *permit* a trial *de novo*.

In order to understand the kind of "fact" the court was referring to, it is necessary to consider the several possible categories of fact; they are (1) ordinary fact, (2) statutory jurisdictional fact, and (3) constitutional jurisdictional fact. (1) An ordinary fact, for instance, and in respect to the Longshoremen's and Harbor Workers' Act, would be the extent of the employee's disability or the amount of his wages. (2) A statutory jurisdictional fact would be, for instance, whether the injury arose out of and in the course of employment or whether the injured

employee was a member of a crew. *Wm. Spencer & Son Corp. v. Lowe*, 152 F. (2d) 847 (C.A. 2, 1946). If the injury did not arise out of and in the course of the employment, or if the employee were a member of a crew, of course the deputy commissioner would not have jurisdiction *under the statute* to make an award; the limitation imposed upon him exists by reason of the provisions in the statute itself. Such limitation, therefore, would consist of a *statutory* limitation, not a fundamental limitation in the constitutional sense. The facts considered in determining a statutory jurisdictional question are commonly referred to as *statutory jurisdictional facts*. (3) A constitutional jurisdictional fact is one which is considered in determining the jurisdiction of the deputy commissioner from an entirely different standpoint, — not because of a limitation appearing *in the Act*, but bearing upon the question whether Congress had the power or authority to legislate with reference to the particular matter. Here the emphasis is upon the *power of Congress* rather than upon the statutory limitations affecting the deputy commissioner. Under this category the fact question arises in a broader field so as to affect the deputy commissioner's right to act, because of some constitutional prohibition or limitation upon the power of Congress. It is, therefore, to the Constitutional question rather than to the statutory

question that the facts may relate, which gives character to such facts as “constitutional jurisdictional facts,” or, as identified by the Supreme Court in *Crowell v. Benson* as basic or fundamental facts. They are called basic or fundamental because upon their existence may depend the jurisdiction of the deputy commissioner to act, not because of the express provisions of the statute, but because of the constitutional limitation of the exercise of the Congressional power.

In what category belongs the fact question — Was the employee injured upon the navigable waters of the United States? The statute provides for the payment of compensation for disability or death only from injury “occurring upon the navigable waters of the United States”. The fact of injury upon the navigable waters of the United States is a statutory not Constitutional requirement. There is nothing in the Constitution which would prohibit Congress from providing for compensation for injuries sustained in maritime employment which occurred other than upon navigable waters of the United States. Even in the maritime field the events which Congressional legislation may affect do not necessarily have to occur on water. *O'Donnell v. Great Lakes Dredge and Dock Co.*, 318 U.S. 36 (1942); *Strika v. Netherlands Ministry of Traffic*, 185 F. (2d) 555 (C.A. 2, 1950); see

also Benedict, The American Admiralty, Fifth Edition, Section 25. There would appear to be no question of the power of Congress in this respect which would give rise to a constitutional fact question or a "basic", or "fundamental" question such as *Crowell v. Benson* speaks of. In *Crowell v. Benson* the question whether the injury occurred upon the navigable waters of the United States was not involved; hence that court's expressions regarding the right of trial *de novo* as to the *locus* of the injury is *obiter dicta* and not binding upon this court in the instant case. *Pacific S.S. Co. v. Peterson*, 278 U.S. 130; *Harriman v. Northern Securities*, 197 U.S. 244; *Williams v. United States*, 289 U.S. 553.

Even as to expressions of the Supreme Court which are not *obiter dicta*, lower courts may decline to follow them where it appears that the court itself in later pronouncements has considered them unsound. *Barnette v. West Virginia State Board of Education*, 47 F. Supp. 251 (W. Va.) *aff'd* 319 U.S. 624. Moreover, lower Federal Courts need not follow decisions of the Supreme Court where "new doctrinal trends" are indicated by later decisions. *Perkins v. Endicott Johnson Corp.*, 128 F. (2d) 208, 217-218 (C.A. 2) *aff'd*. 317 U.S. 501. Later decisions of the Supreme Court have all but overruled *Crowell v. Benson* —

See *Davis v. Department of Labor*, 317 U.S. 249, 256; *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251; *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469; cf. concurring opinion in *Estep v. United States*, 327 U.S. 114 at page 142. The Supreme Court has neither cited *Crowell v. Benson* with approval nor followed it in any subsequent case in so far as the expressions therein upon the right of trial *de novo*. Cf. *Myers v. Bethlehem Corp.*, 303 U.S. 41, 50; *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177; *Labor Board v. Hearst Publications*, 322 U.S. 111. The opinion in *Crowell v. Benson* also elicited uniform criticism from legal commentators. See e.g. Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determination of Questions of "Constitutional Fact"* (1932), 80 U. Pa. L. Rev. 1055; Stumberg, *Finality of Administrative Process Under the Longshoremen's and Harbor Workers' Compensation Act* (1932), 10 Tex. L. Rev. 438; 30 Mich. L. Rev. 1312 (1932); 32 Col. Rev. 738 (1932); 10 N.Y.U.L. Q. Rev. 98 (1932); 41 Yale L.J. 1037 (1932); 21 Calif. L. Rev. 266 (1933) 46 Harv. L. Rev. 478 (1933); Larson, *The Doctrine of "Constitutional Fact"* (1941) 15 Temple U.L.Q. 185. Two writers predicted that it would eventually be overruled. Landis, *The Administrative Process* (1938), p. 141, and *Crucial Issues in Administrative Law* (1940), 53 Harv. L. Rev. 1077,

1093; Davis, *Judicial Emasculation of Administrative Action and Oil Proration* (1940), 19 Tex. L. Rev. 29, 58. *A fortiori* a statement by the court as *obiter dicta* may be disregarded. *Cohens v. Virginia*, 6 Wheat., 264, 399 (cited with approval in *Humphrey's Executor v. United States*, 295 U.S. 602, 627).

Although Congress had the constitutional *power* to provide the workmen's compensation remedy for injuries sustained on shore, Congress nevertheless confined the application of the Longshoremen's Act to injuries which occur upon the navigable waters of the United States, because longshoremen were already protected by state laws with reference to injuries sustained on land, and Congress merely "filled in the gap" as to the injuries sustained upon the navigable waters; see *Parker v. Motor Boat Sales, Inc.*, *supra*; and *DeBardleben Coal Co. v. Henderson*, *supra*. It is obvious that Congress did not use or exhaust its *full power*. In fact, Congress did include in the Longshoremen's Act coverage as to *some* injuries which occur physically upon land, namely, those which occur upon any dry dock. Sec. 3 (a). Therefore, since a question of fact relating to the locus of injury does not involve the *constitutional authority of Congress to legislate*, but only the jurisdiction of the deputy commissioner to act under the statute, *locus* would be merely a statutory jurisdictional fact ques-

tion similar to other (non-constitutional) fact questions, such as whether a particular injury arose out of and in the course of employment, the absence of which prerequisite would deprive the deputy commissioner of authority to make an award.

At no place in the Longshoremen's Act did Congress provide for a trial *de novo*. On the contrary, it conferred upon the deputy commissioner "full power to hear and determine all questions in respect of such claim" subject only to the power of the court to set aside his order if "not in accordance with law". That phrase was borrowed by Congress from the statute enacted for review by the Circuit Court of Appeals of decisions of the Board of Tax Appeals. The phrase had a well settled meaning at the time of the enactment of the Longshoremen's Act; it was construed by the United States Supreme Court to mean a *review upon the record of the Board*: *Phillips v. Commissioner*, 283 U.S. 589. That is the review which Congress intended to be had under Section 21(b) of the Longshoremen's Act (33 U.S.C.A. Sec. 921 (b)). It is the kind of review generally granted under the workmen's compensation laws of the various states. Numerous decisions of state courts declare the administrative findings of fact to be conclusive. The Supreme Court itself upheld the constitutionality of such finality in the administrative determination in the case

of *Dalstrom Metallic Door Co. v. Industrial Board*, 284 U.S. 594, affirming 256 N.Y. 199, 176 N.E. 141, which arose under the New York Workmen's Compensation Law. To permit the employee to relitigate on a *de novo* basis the issues as to the *statutory jurisdictional facts* would be to disregard the record of the evidence painstakingly produced before the deputy commissioner and to have the proceedings before the deputy commissioner merely a *preliminary hearing* to a trial in court. Such a process would "defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to the task. The object is to secure within the prescribed limits of the employer's liability an immediate investigation and a sound, practical judgment, and the efficacy of the plan depends upon the finality of the determination of fact with respect to the circumstances, nature, extent and consequences of the employee's injuries and the amount of compensation that should be awarded". The foregoing quoted language is from *Crowell v. Benson*, *supra*, at pages 46-47 of that opinion. In several cases subsequent to *Crowell v. Benson*, the Supreme Court pointedly emphasized that determinations of fact, where supported

by evidence, are final and conclusive and not subject to retrial: *South Chicago Coal & Dock Co., et al. v. Bassett*, 309 U.S. 251 (1940); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America*, 288 U.S. 162 (1933); *Jules C. L'Hote, et al. v. Crowell*, 286 U.S. 528 (1932); *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941); *Marshall v. Pletz*, 317 U.S. 383 (1943). Certainly the question as to *where* an injury occurred is a statutory jurisdictional fact, pure and simple.

Assuming, however, that the issue which appellants below demanded tried *de novo* were a constitutional jurisdictional question, the granting of the request would be within the discretion of the court (this view accords with the opinion expressed in Professor Larson's review of *Crowell v. Benson* in *The Doctrine of Constitutional Fact*, 15 Temple U.L.Q. 185). The Court in *Crowell v. Benson*, *supra*, did not say that a trial *de novo* of the basic or fundamental facts was *mandatory*. It merely stated that the lower court did not err in *permitting* such trial *de novo*. See also the decision in *Moran v. Lowe*, 52 F. Supp. 39 (1943) to the same effect. Cf. *Wm. Spencer & Son Corp. v. Lowe*, 152 F. (2d) 847 (C.A. 2, 1946); *Tyler v. Lowe*, 138 F. (2d) 867 (C.A. 2, 1943). See Vol. 30, No. 8 Michigan Law Review, page 1314.

The allegations in paragraph IV of the petition in the instant case would seem to preclude a trial *de novo*. It is there alleged that Markovich on October 18, 1950, was working aboard the tug "EL SOL" which had been pulled onto plaintiffs' marine railway and that the employee "fell from said tug". *There is no dispute as to these facts*. It would thus appear that there is no *real issue of fact*, and that it would be superfluous to again call witnesses to prove the same facts. Appellants did not allege below that they had any evidence differing from that produced before the deputy commissioner as to the *locus* of the injury. In these circumstances, as the court stated in the recent case of *Luckenbach S.S. Co. v. Lowe*, 96 F. Supp. 918 (Pa. 1951):

"The Act (Longshoremen's Act) was not construed to compel the court to do so (try the case *de novo*) without the exercise of discretion. See *Moran v. Lowe*, 52 F. Supp. 39; Larson, 'The Doctrine of Constitutional Fact', 15 Temple L.Q. 185, 206 (1941). It appears that the evidence upon the so-called questions of jurisdictional fact has been fully and completely presented before the Deputy Commissioner and the plaintiff does not allege that he has new or different evidence to present to the Court; nor does the plaintiff advance any other valid reason why there should be a new record. On the contrary, he merely claims a trial *de novo* as of right. This Court is unwilling to hear *de novo* the same testimony already offered before the Deputy Commissioner."

And in determining the *locus* of the injury, the court is "aided by the provision of the Federal Act, 33 U.S.C. Sec. 920, that, in proceedings under the Act, jurisdiction is to be 'presumed, in the absence of substantial evidence to the contrary'." See *Davis v. Department of Labor*, *supra*, at p. 256.

In view of the above, the request for a trial *de novo*, it must be contended, was properly denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the court below denying the motion for trial *de novo* and dismissing the petition was proper and should be affirmed.

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In the
United States
Court of Appeals
For the Ninth Circuit

WESTERN BOAT BUILDING COMPANY, a Partnership,
and UNITED PACIFIC INSURANCE COMPANY, a Corporation,
Appellants,

vs.

J. J. O'LEARY, Deputy Commissioner, 14th Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act, and
ROBERT MARKOVICH,
Appellees.

No. 13091

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF STATE OF WASHINGTON
AMICUS CURIAE

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FILED

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TRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION

**BRIEF OF STATE OF WASHINGTON
AMICUS CURIAE**

STATEMENT DISCLOSING JURISDICTION

This is an appeal by an employer from a final order of the United States District Court for the Western District of Washington, Southern Division. The Department of Labor and Industries of the State of Washington, which had taken jurisdiction of the injury and made payments to the injured man, which payments were accepted by the injured man, was never at any time made a party to the matter. The Deputy Commissioner under the Longshoremen's and Harbor Workers' Act, took

jurisdiction and made an award subsequent to the time the State of Washington made its award. The District Court affirmed the action of the Deputy Commissioner, and employer has appealed.

STATEMENT OF THE CASE

The injured workman, Robert Markovich, was working upon a tug, which tug had been pulled upon a marine railroad. The marine railroad is on the land but a portion of the railroad extends into the water and the tug being repaired had been placed on said railroad and pulled out of the water onto the land. The workman fell from said tug, while working upon it, to the shore below where he sustained his injuries.

The legislature of the State of Washington in the year 1925 enacted chapter 111, which *inter alia* reads as follows:

“Section 18-a. The provisions of this act shall apply to all employers and workmen engaged in maritime occupations for whom no right or obligation exists under the maritime laws for personal injuries or death of such workmen.

“If an accurate segregation of pay rolls covering any class or classes of workmen engaged in maritime occupations and working part time on shore and part time off shore cannot be made by the employer, the director of the department of labor and industries is hereby authorized and directed to fix from time to time a basis for the approximate segregation of the pay rolls of such class or classes of employees to cover the shore part of their work, and the employer shall pay to the accident fund on that basis for the time such workmen are engaged in their work.”

Following the above section of the statute, the director of labor and industries placed the employer, the

Western Boat Building Company, a partnership, and the employee, Robert Markovich, in the proper class and proceeded to levy upon the Western Boat Building Company, a partnership, its tax as provided by law, and when the injured workman was injured, the Department of Labor and Industries proceeded to entertain his claim and to pay to him the proper amount for his injuries, all because they had segregated the work which men were doing for the Western Boat Building Company, and the work that Robert Markovich had done, being on the land and on a marine railroad, they proceeded to pay him in accordance with the law.

SPECIFICATION OF ERRORS

1. The Deputy Commissioner erred in taking jurisdiction and the District Court erred in affirming the Commissioner.

2. The parties erred in attempting to bind the Department of Labor and Industries of the State of Washington, as to past payments made to Robert Markovich and as to the future course of the department, the department never having been a party before the Commissioner or the District Court.

ARGUMENT

The coverage under the Longshoremen's and Harbor Workers' Compensation Act is found in the Act of March 4, 1927, Chapter 509, section 3, 44 Stat. 1426; section 903 of Title 33 of the United States Code, 1946 edition. The section as to coverage reads in part as follows:

"a. Compensation shall be payable under this chapter in respect to disability or death of an employee, but only if the disability or death results

from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings, may not validly be provided by State law. * * * ”

In 1936, the Supreme Court of the State of Washington, sitting *en banc*, reviewed all of the Washington cases and the United States Supreme Court cases up until that time of the clause, “if recovery for the disability or death through a workmen's compensation proceeding may not validly be provided by state law.”

After reviewing both the decisions of the Supreme Court of the United States and the decisions in the State of Washington, the Supreme Court of the State announced this doctrine in the case of *Puget Sound Bridge & Dredging Co. v. Department of Labor & Industries*, 185 Wash. 349, 352:

“From these decisions, it is clear that, primarily, the criterion by which it is to be determined whether the claim of an injured workman comes under admiralty jurisdiction or under a state compensation act is the *place where* the injury was sustained. If the injury occurs on navigable water, the rights of the workman and the liability of his employer are to be determined by maritime law. If he is injured on land, his rights are governed by the state compensation act, notwithstanding he may be engaged in maritime work.”

The State Supreme Court then cites the law in the State of Washington and in arriving at its conclusion the Supreme Court of the State cited the following United States Supreme Court cases:

Southern Pacific Co. v. Jensen, 244 U. S. 205.
Minnie v. Port Huron Terminal Co., 295 U. S. 647.
Smith & Son v. Taylor, 276 U. S. 179.
Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469.

Gonsalves v. Morse Dry Dock & Repair Co., 266 U. S. 171.

Sultan R. & T. Co. v. Department of Labor & Industries, 277 U. S. 135.

Miller's Indemnity Underwriters v. Brand, 270 U. S. 59.

WAS RECOVERY VALIDLY PROVIDED BY STATE LAW?

"Validly be provided by State law" has been interpreted to "refer to authority of state to act, not to inquiry whether state has exercised power."

U. S. Casualty Co. v. Taylor, 64 F. (2d) 521, 522.

State provision for the injured man is sustained by the following U. S. Supreme Court cases:

Southern Pacific Co. v. Jensen, 244 U. S. 205.

Sultan R. & T. Co. v. Department of Labor & Industries, 277 U. S. 135.

In referring to the *Jensen* case, 244 U. S. 205, 216, the Supreme Court of the United States said:

"The Washington statute represents a state effort to clarify the situation."

Davis v. Department of Labor & Industries, 317 U. S. 249.

And again in the *Davis* case the Supreme Court of the United States, after quoting Rem. Rev. Stat., §§ 7674, 7693a and the Longshoremen's and Harbor Workers' Act, 33 U. S. C. § 901, said,

"Here again, (Longshoremen's and Harbor Workers' Act) however, Congress made clear its purpose to permit state compensation protection whenever possible, by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.' "

Davis v. Department of Labor & Industries, 317 U. S. 249.

THE PLACE OF THE INJURY

In this cause, Mr. Markovich testified as follows (Tr. 34):

"Q. Calling your attention particularly to the tug boat El Sol, where was this tugboat situated when you were working on it?

"A. It was on the marine ways, that is, on the farther side. I don't know whether you would call it—that was on the ways—marine ways No. 1.

"Q. Where is that situated?

"A. In the yard there."

Transcript of Record, page 34. Testifying further, Mr. Markovich says (Tr. p. 35):

"Q. And this marine railway you speak of—does this railway run down into the water?

"A. Oh, yes.

"Q. Do you know how far out it runs into the water?

"A. Oh, I should judge about a hundred—hundred and fifty feet.

"Q. And this tugboat El Sol had been placed on a cradle, and had it been taken up out of the water?

"A. Yes.

"Q. It was standing on the marine railway at the time you were working on it?

"A. Yes.

"Q. Do you know how far up on the end of the railway it had been drawn up? Do you have any idea how far up?

"A. How far up?

"Q. Yes, from the end of the railway—how far had it been drawn up? I am speaking of the end that runs down into the water, Mr. Markovich?

"A. I don't know. I can't answer that.

"Q. You don't know then?

"A. It was quite a ways. It was pulled out so that we was able to work around the boat, so that—well, so it lay in a straight place so we could

work all around the boat when the tide came in—the high tide.

“Q. When the high tide came in, would part of the keel still be in the water?

“A. Part would be.

“Q. Do you know how long the boat had thus been up on the railway?

“A. I don’t think it had been there very long—few days, or about a week.”

The work that Mr. Markovich was engaged in was a matter of purely local concern unconnected with navigation and was essentially not maritime in its nature. Upon a marine railway, the boat is hauled up by some power other than its own and not connected with navigation, out of the water and to a point upon the land where the boat remains until its future is determined by its owner. It may return to its native elements, or it may be destroyed with or without the intention to terminate its career as a vessel. In the instant case the man was working on the shore and in duty not connected in any way with navigation.

Rholfs’ v. Dept. of Labor & Industries, 190 Wash. 566, 570.

A reference to the Shepard’s Citator, 1951, shows no change in the *Rholfs’* case but does show that the law in the *Rholfs’* case is the law in the State of Washington at this time.

In *State Industrial Commission of New York v. Nordenholt Corp.*, 259 U. S. 263, the Supreme Court of the United States employed a strict geographic test, holding that a longshoreman injured while working on land remained covered by the State Workmen’s Compensation Act in question.

A reference to Shepard’s Citator shows this case has never been overruled.

In the above case, the U. S. Supreme Court, in reviewing *Southern Pacific Co. v. Jensen*, 244 U. S. 205, said:

“The injury therein occurred on navigable waters.”

The court also reviewed the case of *Atlantic Transport Co. v. Imbrovck*, 234 U. S. 52, 59, 60, and also pointed out that the injury in that case occurred in navigable waters.

In the New York case the U. S. Supreme Court pointed out that in contract cases admiralty jurisdiction depended on the nature of the transaction while in tort cases the location determined the jurisdiction, and further said injuries to workmen fell under the head of contracts.

No appeal having been taken from the order of the Washington compensation award to the proper state court, and the Washington State Department, never having been a party, the jurisdiction of the state department is not now before this court. *Desper v. Starved Rock Ferry Co.*, a corporation. No. 231, October term 1951. Supreme Court of the United States.

CONCLUSION

The state had jurisdiction, as the matter of the injury of Robert Markovich was sustained under a solid and existing contract with the State of Washington, and the exclusive jurisdiction was in the State of Washington.

Respectfully submitted,

SMITH TROY,

Attorney General of the State of Washington

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Assistant Attorney General.

Attorneys for Amicus Curiae.

No. 13092

United States
Court of Appeals
For the Ninth Circuit.

OREGON AUTOMOBILE INSURANCE COM-
PANY,

Appellant,

vs.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation, BEULAH
MORRIS and WILLIAM MORRIS,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon.

FILED

DEC - 6 1951

No. 13092

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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William Morris, Appellees.

In the District Court of the United States for the
District of Oregon

Civil No. 5890

UNITED STATES FIDELITY and GUARANTY
COMPANY, a Corporation,

Plaintiff,

vs.

OREGON AUTOMOBILE INSURANCE COM-
PANY, RAYMOND SUTER, WILLIAM
MORRIS, BEULAH MORRIS, HOUK
MOTOR COMPANY and REDMOND
MOTOR COMPANY,

Defendants.

PETITION FOR DECLARATORY
JUDGMENT

Comes now the plaintiff and for cause against
these defendants, and each of them, and alleges as
follows:

I.

That at all times herein mentioned, United States
Fidelity & Guaranty Company is and was a cor-
poration, duly organized and existing under and
by virtue of the laws of the state of Maryland,
and had qualified and was doing business in the
state of Oregon, and elsewhere, as an insurance
company.

II.

That the defendants, Oregon Automobile Insur-
ance Company, Raymond Suter, Houk Motor Com-

pany and Redmond Motor Company are residents of the state of Oregon.

III.

That the defendants, Beulah Morris and William Morris are residents of the state of Washington.

IV.

That this controversy involves an amount over and above the sum of \$3000.00, exclusive of interest, costs and attorneys' fees.

V.

That at all times herein mentioned, the above-named plaintiff, for a good and valuable consideration paid to it by Raymond Suter, did make, execute and deliver to the said Raymond Suter, a certain policy of insurance covering a certain Plymouth Club Coupe automobile, motor #P18-138404, which policy was at all times in full force and effect, a substantial copy of which policy is hereto attached and marked "Exhibit A," and made a part and parcel of this petition as though fully and particularly set forth and plead at this place, and by reference thereto, each and every provision thereof is made a part and parcel of this petition.

VI.

That the limit of liability in said policy executed by this plaintiff as hereinabove particularly recited is the sum of \$5000.00 for bodily injury to each person, and \$10,000.00 limited to each accident.

VII.

That the defendant, Oregon Automobile Insurance Company, a corporation, of the state of Oregon, carrying on an insurance business in the said state, and elsewhere, had at all times herein mentioned for a good and valuable consideration, made, executed and delivered to Houk Motor Company and Redmond Motor Company, a certain policy of insurance, a copy of the material part of which is hereto attached marked "Exhibit B," and made a part and parcel of this petition as though fully and completely set forth and alleged at this place, and that at all times herein mentioned, the said insurance policy was in full force and effect, which said policy did cover the operation of the Mercury automobile hereinafter referred to.

VIII.

That on or about the 15th day of October, 1949, the defendant, Raymond Suter, at the request and with the full consent and knowledge of defendants, Houk Motor Company and Redmond Motor Company, was driving and operating a certain Mercury automobile, belonging to the said defendant, Houk Motor Company or Redmond Motor Company, bearing dealer's license #A 75.

IX.

That on or about the 15th day of October, 1949, while so driving the said Mercury automobile, the defendant, Raymond Suter, did run into and collide with an automobile, being driven on U. S.

Highway #97, in which Beulah Morris was riding as a passenger, in such a way and manner that the said Beulah Morris did receive certain personal injuries.

X.

That thereafter the said Beulah Morris did bring an action at law for personal injuries in the county of Deshutes, Oregon, commonly known as case #7780, in which she named Raymond Suter, Houk Motor Company, a corporation, and James Stuchlik as defendants; that thereafter and on about the 20th day of November, 1950, the said case was tried in Deschutes County resulting in a verdict and judgment against the defendant, Raymond Suter, in the sum of \$7,360.00, a copy of which judgment as entered in Deschutes County, is hereto attached and marked the plaintiff's "Exhibit C," and by reference is made a part and parcel of this petition as though fully and completely set forth and plead at this place.

XI.

That the said judgment is now in full force and effect, has not been appealed from and has not been satisfied, and that the full amount thereof, together with interest, and costs of the said trial, is due and payable.

XII.

That the said Beulah Morris did, during the pendency of the action in the County of Deschutes hereinabove particularly described, bring an action at law for damages over the same accident as hereinabove described in the County of Marion, state

of Oregon, which action was entitled, "Beulah Morris vs. Raymond Suter and James Stuchlik."

XIII.

That the said Raymond Suter and the United States Fidelity & Guaranty Company did demand and continue to demand that the Oregon Automobile Insurance Company represent and defend the said Raymond Suter in both of the above-described actions brought by Beulah Morris.

XIV.

That William Morris, the driver and operator of the automobile in which the plaintiff, Beulah Morris, was riding at the time of the collision with the defendant, Raymond Suter, has now brought an action in the state of Oregon, County of Deschutes, demanding judgment against Raymond Suter, Redmond Motor Company and James Stuchlik, defendants, for the sum of \$9,250.00, for personal injuries and property damages caused by the said accident hereinabove particularly described; That demand has been made upon the Oregon Automobile Company that they accept coverage and defend this action for the benefit of the said Raymond Suter under their policy of insurance, a copy of which is hereto attached and marked plaintiff's "Exhibit B."

XV.

That the Oregon Automobile Insurance Company has failed and refused to accept coverage for the said Raymond Suter, and failed and refused to defend the said Raymond Suter in any one of the

causes of action, and that due to the said refusal on the part of the Oregon Automobile Insurance Company, this plaintiff was forced to, and did employ attorneys to represent the said Raymond Suter in the County of Marion, and that said cause of action was abandoned, and that said plaintiff was required to and did pay reasonable attorneys' fees and costs in the sum of \$223.20, in that cause of action.

XVI.

That due to the failure of the Oregon Automobile Insurance Company to represent and defend Raymond Suter in the action of Beulah Morris vs. Raymond Suter in Deschutes County, this plaintiff was forced to and did employ an attorney to represent the said Raymond Suter, and did pay the said attorney a reasonable attorney fee in the sum of \$428.80 to so do, and an additional sum of \$93.83 expense was paid by it.

XVII.

That due to the denial of liability by the Oregon Automobile Insurance Company to the said Raymond Suter in the action of William Morris vs. Raymond Suter, and others, now on file in Deschutes County, Oregon, this plaintiff will be required to employ attorneys to defend the said Raymond Suter and represent him in said case and cause at an additional expense not now known to this plaintiff.

XVIII.

That the defendants, William Morris, Beulah Morris, Raymond Suter and Oregon Automobile

Insurance Company, are now claiming, contending and demanding that the plaintiff, United States Fidelity & Guaranty Company, under and by virtue of its insurance policy, copy of which is hereto attached and marked "Exhibit A," is required to accept liability and defend the action brought by William Morris against Raymond Suter, hereinabove described, in the Circuit Court of the State of Oregon for Deschutes County; That the said defendants are further claiming and contending that the United States Fidelity & Guaranty Company is required to partially satisfy the judgment in the action of Beulah Morris vs. Raymond Suter, Case #7784, in Deschutes County, Oregon, up to and including the full sum of \$5000.00; That the Oregon Automobile Insurance Company is claiming and contending that it does not cover the said Raymond Suter, nor are they required to defend him or represent him in any of the above-described actions, nor are they required to pay any of the expenses, attorneys' fees and costs in any of the actions hereinabove referred to, and are further claiming and contending that they are not responsible nor are they required to pay the judgment entered in Deschutes County, a copy of which is hereto attached and marked plaintiff's "Exhibit C," and claiming and contending that their insurance policy, "Exhibit B," does not, in any way, apply to or cover the said Raymond Suter.

XIX.

That this plaintiff claims and contends that the

said Raymond Suter is and was fully covered by the insurance policy made, executed and delivered by the Oregon Automobile Insurance Company to the defendants Houk Motor Company and Redmond Motor Company, and it is liable to this plaintiff for all costs heretofore paid by the plaintiff in defense of the said Raymond Suter in the said actions in Marion and Deschutes Counties, and that the said Oregon Automobile Insurance Company, under and by virtue of the terms of its insurance policy, are required to and should accept coverage, represent and defend the said Raymond Suter in the action now pending in the state of Oregon for the County of Deschutes, brought by William Morris against Raymond Suter, and others.

XX.

That the plaintiff and the defendant, Oregon Automobile Insurance Company, are each claiming and contending that the policy of insurance issued by it does not cover nor insure Raymond Suter in the actions hereinabove particularly described; that this plaintiff particularly contends that there is no liability whatsoever on its part, and that at the time and place of the accident its liability was suspended, and that there was no coverage extended to the defendant, Raymond Suter, due to the extended coverage afforded him by the policy of insurance made and executed to the Houk Motor Company and Redmond Motor Company as set forth in "Exhibit" hereto attached.

XXI.

That the plaintiff further claims and contends that under the terms of its policy, it is not required to defend the said Raymond Suter in the action hereinabove described brought by William Morris in the County of Deschutes, State of Oregon, against the said Raymond Suter, and others, nor has it any time insured Raymond Suter for this accident.

XXII.

This plaintiff further claims and contends that the Oregon Automobile Insurance Company is liable and indebted to it for the moneys heretofore expended by this plaintiff in defense of the said Raymond Suter, and that the said Oregon Automobile Insurance Company is indebted to this plaintiff in the full sum of \$745.83.

XXIII.

That Beulah Morris has now levied an execution against the said defendant, Raymond Suter, and is further threatening to garnish this plaintiff by virtue of statutes of Oregon and is threatening to certify the said judgment to the Secretary of State and cancel the driver's license of the said Raymond Suter, and that said plaintiff has received a demand to defend said Raymond Suter in an action brought by Beulah Morris against Raymond Suter, and others, and the said Beulah Morris is further demanding that this plaintiff pay its full \$5000.00 on the judgment hereinabove described.

XXIV.

That by the terms of the Federal Declaratory Judgment Act, Section 274-D (Judicial Court), signed June 14, 1934, the Courts of the United States have been invested with power to declare the rights and other legal relations of each, every and all of these parties and that the above Court has jurisdiction of this suit.

XXV.

That by virtue of the claims and contentions of the parties herein and the demands and threats made on and against this plaintiff, the plaintiff will be subject to untold peril and expense, if it is called upon to act arbitrarily in this matter, and it does specifically allege that there are at present justiciable controversies between the plaintiff company and each, every and all of the defendants, each of whose rights should be fully declared and adjudicated as the final rights of each and all of the said parties.

XXVI.

That the above Honorable Court should issue an Order staying the action of William Morris vs. Raymond Suter, and others, until such time as a declaration may be entered herein, determining the rights of these parties and determining whether this plaintiff or the Oregon Automobile Insurance Company is required to defend the said Raymond Suter, and should issue a further Order staying execution under the judgment heretofore entered in the County of Deschutes, State of Oregon, hereto

attached and marked, "Exhibit C," until such time as the rights of these parties are declared and determined.

Wherefore, the plaintiff prays that a declaratory judgment and decree be entered in this cause as follows:

1. That the court determine and adjudge that the policy of insurance issued by the United States Fidelity & Guaranty Company, "Exhibit A," does not insure nor cover the said Raymond Suter in any of the actions arising out of the collision referred to in this cause.

2. That this court declare, determine and adjudge that there is no liability whatsoever on the part of this plaintiff to any of the defendants hereinabove named.

3. That this court declare and determine that this plaintiff is not required to represent and defend said Raymond Suter in the action brought in Deschutes County, Oregon, by William Morris.

4. That these defendants, and each of them, be forever restrained and enjoined from bringing any action, suit or claim against this plaintiff by virtue of its insurance policy issued by it to the said Raymond Suter.

5. That this court adjudge, declare and decree that the Oregon Automobile Insurance Company is liable to this plaintiff in the full sum of \$745.83 heretofore expended by it in defense of the said Raymond Suter.

6. That the rights and liabilities of each, every and all of the defendants be determined as to them, and each of them, in respect to the said insurance policy made and executed by this plaintiff, and for such other and further relief as to this court may seem meet, equitable and just.

/s/ W. K. PHILLIPS,

Attorney for the Plaintiff.

"EXHIBIT A"



UNITED STATES FIDELITY AND GUARANTY COMPANY

BALTIMORE MARYLAND
(A Stock Insurance Company)

AUTOMOBILE LIABILITY POLICY DECLARATIONS

- Item 1. Name of Insured **Ray E. Suter and/or Lela Suter**
Address **Redmond Deschutes Oregon**
(No. Street Town County State)
The automobile will be principally garaged in the above town, county and state, unless otherwise stated herein
No exceptions
Occupation of the Named Insured **Owner - Suter's Drive-In**
Item 2. Policy Period: From **June 4, 1949** to **June 4, 1950**
12:01 A. M., standard time at the address of the Named Insured as stated herein.
Item 3. The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the Company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

COVERAGES	LIMITS OF LIABILITY	PREMIUMS
A. Bodily Injury Liability	\$ 5,000.00 each person \$ 10,000.00 each accident	1. \$ 17.00 2. \$
B. Property Damage Liability	\$ 5,000.00 each accident	1. \$ 13.50 2. \$
C. Medical Payments	\$ 500.00 each person	1. \$ 4.00 2. \$
		1. \$ 2. \$
Total Premium		\$ 34.50

Item 4. Description of the automobile.

	TRADE NAME	BODY TYPE; TRUCK SIZE; TANK GALLONAGE CAPACITY; OR BUS SEATING CAPACITY	SERIAL OR MOTOR NUMBER	YEAR OF MODEL	MODEL
1.	Plymouth	Club Coupe	S. 25085844 M. P18-138404	1949	DeLuxe
2.			S. M.		

Item 5. The automobile will be used for "Pleasure and Business" if of the private passenger type and "Commercial" if of the commercial type, unless otherwise stated herein:

(a) The term "pleasure and business" is defined as personal, pleasure, family and business use. (b) The term "commercial" is defined as use principally in the business occupation of the Named Insured as stated in Item 1, including occasional use for personal, pleasure, family and other business purposes. (c) Use of the automobile for the purposes stated includes the loading and unloading thereof.

Item 6. (a) Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the Named Insured is the sole owner of the automobile except as herein stated: **No exceptions**
Countersigned by _____
Authorized Representative.

AUTOMOBILE LIABILITY POLICY

and States Fidelity and Guaranty Company (herein called the Company) agrees with the Insured, named in the declarations part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

Coverage A—Bodily Injury Liability

pay on behalf of the Insured all sums which the Insured shall be legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, caused by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile.

Coverage B—Property Damage Liability

pay on behalf of the Insured all sums which the Insured shall be legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.

Coverage C—Medical Payments

pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, ambulance, hospital, professional nursing and funeral services, to or for each person who sustains bodily injury, sickness or disease, caused by accident, while in or upon, entering or alighting from the automobile if the automobile is being used by the Named Insured or with his permission.

Coverage D—Defense, Settlement, Supplementary Payments

respects the insurance afforded by the other terms of this policy under Coverages A and B the Company shall:

defend any suit against the Insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;

pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, and all premiums on appeal bonds required in any such defended suit, the cost of bail bonds required of the Insured in the event of accident or traffic law violation during the policy period, not to exceed the usual charges of surety companies nor \$100 per bail bond, but without any obligation to apply for or furnish any such bonds;

pay all expenses incurred by the Company, all costs taxed against the Insured in any such suit and all interest accruing after entry of judgment until the Company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the Company's liability thereon;

pay expenses incurred by the Insured for such immediate medical and surgical relief to others as shall be imperative at the time of the accident;

reimburse the Insured for all reasonable expenses, other than loss of earnings, incurred at the Company's request.

the amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the Company in addition to the applicable limit of liability of this policy.

Definition of "Insured"

with respect to the insurance for bodily injury liability and for property damage liability the unqualified word "Insured" includes the Named Insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the Named Insured or with his permission. The insurance with respect to person or organization other than the Named Insured does not apply to:

to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof;

to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer.

Automobile Defined, Trailers, Two or More Automobiles Including Automatic Insurance

"Automobile. Except where stated to the contrary, the word "automobile" means:

(1) Described Automobile—the motor vehicle or trailer described in this policy;

(2) Utility Trailer—a trailer not so described, if designed for use with a private passenger automobile, if not being used with another type automobile and if not a home, office, store, display or passenger trailer;

(3) Temporary Substitute Automobile—an automobile not owned by the Named Insured while temporarily used as the substitute for the described automobile while withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction;

(4) Newly Acquired Automobile—an automobile, ownership of which is acquired by the Named Insured who is the owner of the described automobile, if the Named Insured notifies the Company within thirty days following the date of its delivery to him, and if either it replaces an automobile described in this policy or the Company insures all automobiles owned by the Named Insured at such delivery date; but the insurance with respect to the newly acquired automobile does not apply to any loss against which the Named Insured has other valid and collectible insurance. The Named Insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile.

(b) Semitrailer. The word "trailer" includes semitrailer.

(c) Two or More Automobiles. When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability.

Use of Other Automobiles

If the Named Insured is an individual who owns the automobile classified as "pleasure and business" or husband and wife either or both of whom own said automobile, such insurance as is afforded by this policy with respect to said automobile applies with respect to any other automobile, subject to the following provisions:

(a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word "Insured" includes

(1) such Named Insured, (2) the spouse of such individual if a resident of the same household and (3) any other person or organization legally responsible for the use by such Named Insured or spouse of an automobile not owned or hired by such other person or organization. Insuring Agreement III, Definition of Insured, does not apply to this insurance.

(b) This insuring agreement does not apply:

(1) to any automobile owned by, hired as part of a frequent use of hired automobiles by, or furnished for regular use to the Named Insured or a member of his household other than a private chauffeur or domestic servant of the Named Insured or spouse;

(2) to any automobile while used in the business or occupation of the Named Insured or spouse except a private passenger automobile operated or occupied by such Named Insured, spouse, chauffeur or servant;

(3) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place;

(4) under coverage C, unless the injury results from the operation of such other automobile by such Named Insured or spouse or on behalf of either by such chauffeur or servant, or from the occupancy of said automobile by such Named Insured or spouse.

VI Policy Period, Territory, Purposes of Use

This policy applies only to accidents which occur during the policy period, while the automobile is within the United States of America, its territories or possessions, Canada or Newfoundland, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations.

EXCLUSIONS

policy does not apply:

under any of the Coverages, while the automobile is used as a public or livery conveyance, unless such use is specifically declared and described in this policy and premium charged therefor;

under any of the Coverages, to liability assumed by the Insured under any contract or agreement;

under Coverages A and B, while the automobile is used for the towing of any trailer owned or hired by the Insured and not covered by like insurance in the Company; or while any trailer covered by this policy is used with any automobile owned or hired by the Insured and not covered by like insurance in the Company;

- (d) under Coverages A and C, to bodily injury to or sickness, disease or death of any employee of the Insured while engaged in the employment, other than domestic, of the Insured or in domestic employment if benefits therefor are either payable or required to be provided under any workmen's compensation law;
- (e) under Coverage A, to any obligation for which the Insured or any company as his insurer may be held liable under any workmen's compensation law;
- (f) under Coverage B, to injury to or destruction of property owned by, rented to, in charge of or transported by the Insured;
- (g) under Coverage C, to bodily injury to or sickness, disease or death of any person if benefits therefor are payable under any workmen's compensation law.

CONDITIONS

Limit of Liability—Coverage A

The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the Company's liability for damages, including damages for care and loss of services, arising from bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one accident; the total limit of the Company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one accident.

Limit of Liability—Coverage C

The limit of liability for medical payments stated in the declarations as applicable to "each person" is the limit of the Company's liability for expenses incurred by or on behalf of each person who sustains bodily injury, sickness or disease, including death resulting therefrom, in any one accident.

Limit of Liability

No inclusion herein of more than one Insured shall not operate to increase the limits of the Company's liability.

Financial Responsibility Laws—Coverages A and B

Such insurance as is afforded by this policy for bodily injury liability and property damage liability shall comply with the provisions of the financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The Insured agrees to reimburse the Company for any amount made by the Company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

Auto and Battery—Coverages A and B

Auto and battery shall be deemed an accident unless committed by the Insured at the direction of the Insured.

Notice of Accident

When an accident occurs written notice shall be given by or on behalf of the Insured to the Company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to enable the Insured and also reasonably obtainable information concerning the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

Notice of Claim or Suit—Coverages A and B

Any claim is made or suit is brought against the Insured, the Insured

shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

8. Assistance and Cooperation of the Insured—Coverages A and B

The Insured shall cooperate with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

9. Medical Reports; Proof and Payment of Claim—Coverage C

As soon as practicable the injured person or someone on his behalf shall give to the Company written proof of claim, under oath if required, and shall, after each request from the Company, execute authorization to enable the Company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the Company when and as often as the Company may reasonably require.

The Company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute admission of liability of the Insured or, except hereunder, of the Company.

10. Action Against Company—Coverages A and B

No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the Company as a co-defendant in any action against the Insured to determine the Insured's liability.

Bankruptcy or insolvency of the Insured or of the Insured's estate shall not relieve the Company of any of its obligations hereunder.

11. Action Against Company—Coverage C

No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy, nor until thirty days after the required proofs of claim have been filed with the Company.

12. Other Insurance—Coverages A and B

If the Insured has other insurance against a loss covered by this policy the Company shall not be liable under this policy for a greater

(Continued on Reverse Side)

tion of such loss than the applicable limit of liability stated in
clarations bears to the total applicable limit of liability of all
and collectible insurance against such loss: provided, however,
insurance with respect to temporary substitute automobiles un-
insuring Agreement IV or other automobiles under Insuring
ment V shall be excess insurance over any other valid and col-
insurance available to the Insured, either as an Insured under
y applicable with respect to said automobiles or otherwise.

Insurance—Coverage C

insurance afforded with respect to other automobiles under
g Agreement V shall be excess insurance over any other valid
lectible medical payments insurance applicable thereto.

Insurance—Coverages A and B

the event of any payment under this policy, the Company shall
ogated to all the Insured's rights of recovery therefor against
son or organization and the Insured shall execute and deliver
ents and papers and do whatever else is necessary to secure
ghts. The Insured shall do nothing after loss to prejudice such

Insurance

to any agent or knowledge possessed by any agent or by any
erson shall not effect a waiver or a change in any part of this
or stop the Company from asserting any right under the terms
policy: nor shall the terms of this policy be waived or changed,
by endorsement issued to form a part of this policy.

Insurance

ment of interest under this policy shall not bind the Com-
until its consent is endorsed hereon: if, however, the Named
shall die or be adjudged bankrupt or insolvent within the
period, this policy, unless canceled, shall, if written notice be
to the Company within sixty days after the date of such death

Witness Whereof, the United States Fidelity and Guaranty Company has caused this policy to be signed by its President and
ry at Baltimore, Maryland, and countersigned by a duly authorized representative.

or adjudication, cover (1) the Named Insured's legal representative
as the Named Insured, and (2) under Coverages A and B, subject
otherwise to the provisions of Insuring Agreement III, any person
having proper temporary custody of the automobile, as an Insured,
and under Coverage C while the automobile is used by such person,
until the appointment and qualification of such legal representative
but in no event for a period of more than sixty days after the date
of such death or adjudication.

17. Cancellation

This policy may be canceled by the Named Insured by mailing to
the Company written notice stating when thereafter such cancellation
shall be effective. This policy may be canceled by the Company by
mailing to the Named Insured at the address shown in this policy
written notice stating when not less than five days thereafter such
cancellation shall be effective. The mailing of notice as aforesaid
shall be sufficient proof of notice and the effective date of cancellation
stated in the notice shall become the end of the policy period.
Delivery of such written notice either by the Named Insured or by
the Company shall be equivalent to mailing.

If the Named Insured cancels, earned premiums shall be computed
in accordance with the customary short rate table and procedure.
If the Company cancels, earned premiums shall be computed pro rata.
Premium adjustment may be made at the time cancellation is effected
and, if not then made, shall be made as soon as practicable after
cancellation becomes effective. The Company's check or the check of
its representative mailed or delivered as aforesaid shall be a sufficient
tender of any refund of premium due to the Named Insured.

18. Declarations

By acceptance of this policy the Named Insured agrees that the
statements in the declarations are his agreements and representations,
that this policy is issued in reliance upon the truth of such representa-
tions, and that this policy embodies all agreements existing between
himself and the Company or any of its agents relating to this insurance.

DUPLICATE
SPECIMEN COPY

Automobile

Liability Policy

No. NA 556225

Issued To

Ray E. Suter and/or Lela
Suter

Expires June 4, 1950

at Twelve and One Minute O'Clock A. M.

U. S. F. & G.

UNITED STATES FIDELITY
and GUARANTY COMPANY
BALTIMORE 3, MARYLAND



Attached to Liability Policy

United States Fidelity and Guaranty Company
Baltimore, Maryland

Private Passenger Automobile Classifications
(Rating Information)

On the basis of the company's information when the policy is written, the automobile is classified A-1, A-2 or A-3, as evidenced by whichever of such symbols is shown together with the trade name of the automobile in the declarations.

Class A-1 means

1. use of the automobile is not required by or customarily involved in the occupational duties of any person except in going to and from the principal place of occupation;

2. there is no operator of the automobile under 25 years of age resident in the named insured's household or employed as a chauffeur of the automobile, and

3. the estimated mileage of the automobile, including any replacement thereof, during the next twelve months is not over 7500 miles.

Class A-2 means

1. use of the automobile is not required by or customarily involved in the occupational duties of any person except in going to and from the principal place of occupation, and

2. there is no operator of the automobile under

25 years of age resident in the named insured's household or employed as a chauffeur of the automobile.

Class A-3 means

use of the automobile is not required by or customarily involved in the occupational duties of any person except in going to and from the principal place of occupation.

Automobiles Owned by Farmers or Clergymen—Provisions with respect to the use of the automobile in occupational duties do not apply to automobiles owned by farmers or clergymen.

“EXHIBIT B”

Policy insured Houk Motor Company, Redmond Motor Company and Redmond Tractor Company, from October 1, 1949, to October 1, 1950, Limits \$100,000.00

Other coverage: Blanket insurance

Property damage and collision

Cargo Liability and towing

During the life of the policy, automobiles will not be used as public or livery conveyance, towing or propelling trailers or other vehicles except trailers used for personal, pleasure or family purposes being used with an automobile of private passenger type; however, this exclusion shall apply to trailer homes and trailers used for business purposes, other than a trailer of a passenger type.

Under the blanket basis, the policy does not apply:

A. Unless the use of the automobile is with the permission of the named insured.

B. To any automobile owned by the insured or by a member of his family other than the named insured.

C. With respect to the injury to or death of any person who is named insured.

D. To any employee with respect to injury or death of another employee of the same employer injured in the course of such employment. The insurance applies to any other person or organization provided the insurance applies only if the named insured's operation is classified as automobile dealer or repair shop and only with respect to the use, for such business operations or for pleasure purposes of any automobile covered under such classification.

Under Title: "Additional Insured" the policy reads:

"The insurance granted by clauses E and F shall in the same manner and under the same conditions, declarations and exclusions as to the insured, apply to any person while legally operating any automobile described in the schedule of warranties with the permission of the assured, and also to any person, firm or corporation legally responsible for the use thereof, provided the declared and actual use of the automobile is business and pleasure or commercial, each as defined herein, and provided

further that the actual use is with the permission of the named assured, provided that any additional assured who is covered by valid and collectible insurance against a claim also covered hereby shall have no right of recovery under this policy; provided further that in the event the insured or additional insured suffer bodily injury or death, or damage to property through the act or omission of any other person occupying or operating said automobile, such person shall not be an additional assured within the terms of this policy; provided further that in the event a person who would otherwise be an additional assured by reason of having been given permission to operate the car, shall permit another to operate the car, neither party shall be an additional assured or be entitled to coverage under this policy. The insurance herein granted such additional assured shall be subject to all the conditions, declarations and exclusions of this policy, and said condition, declarations and exclusions shall apply to and be binding upon the additional assured in the same manner and with the same effect as to and upon the assured and it shall be the duty of the additional assured to comply with and perform all the conditions and requirements of this policy. If an automobile covered by this policy is sold or transferred, the indemnity provided herein shall not extend to such purchaser or transferee, unless the interest in the policy is as-

signed in accordance with all the conditions relating to the manner of such transfer.

“This company will not be liable if any other person, firm or corporation indemnified hereunder is covered by valid and collectible insurance against a claim also covered by this policy, such other person, firm or corporation shall not be indemnified under this policy.”

“EXHIBIT C”

In the Circuit Court of the State of Oregon
for the County of Deschutes

No. 7784

BEULAH MORRIS,

Plaintiff,

vs.

RAYMOND SUTER, HOUK MOTOR COMPANY, a Corporation, and JAMES STUCHLIK,

Defendants.

JUDGMENT

The above-entitled matter came on regularly for trial before a jury in the Court of the Honorable Judge Ralph Hamilton on the 20th day of November, 1950, at which time the plaintiff appeared in person and by and through her attorneys Duane Vergeer and Harry F. Samuels; defendant Raymond Suter appeared in person and by and through his attorneys, George Brewster and Bruce Spaulding; Houk Motor Company, a corporation, ap-

peared by and through its attorney George Brewster; and James Stuchlik appeared in person and by and through his attorney Bruce Spaulding; a jury was duly and regularly empanelled and sworn to well and truly try the above-entitled cause, opening statements were made by counsel for plaintiff and defendants James Stuchlik, and Houk Motor Company, and defendant Raymond Suter waived his opening statement; evidence was produced by the plaintiff in support of the allegations of her complaint and the plaintiff moved for an order of voluntary non-suit as to defendant Houk Motor Company, which said order was granted by the Court, and plaintiff then rested, and defendant James Stuchlik moved for an order of involuntary non-suit which was granted by the Court; evidence was then produced by defendant Raymond Suter, and said defendant having rested, closing arguments were had by respective counsel, the jury was instructed as to the law of the case and thereupon retired to deliberate upon its verdict, and after due deliberation returned into Court its verdict, title and venue omitted, as follows:

“We, the jury duly empanelled to well and truly try the above-entitled cause, hereby find our verdict in favor of the plaintiff, Beulah Morris, and against defendant Raymond Suter, and assess plaintiff’s damages in the sum of \$7,360.00.

/s/ WAYNE GADDIS,
Foreman.

and plaintiff having moved for judgment based thereon,

It Is Hereby Ordered and Adjudged that judgment be and hereby is entered herein in favor of the plaintiff and against defendant Raymond Suter, in the sum of \$7,360.00, and

It Is Further Ordered and Adjudged that plaintiff be and hereby is awarded judgment against the defendant for plaintiff's costs and disbursements, herein, taxed and allowed in the sum of \$.

Dated this. day of November, 1950.

RALPH HAMILTON,
Judge.

[Endorsed]: Filed January 12, 1951.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS OREGON AUTOMOBILE INS. CO., HOUK MOTOR COMPANY and REDMOND MOTOR CO.

Come now the defendants, Oregon Automobile Insurance Co., Houk Motor Company and Redmond Motor Company, and each of them, and for answer to plaintiff's petition for a declaratory judgment, admit, deny and allege as follows:

I.

Admit paragraph I of said petition.

II.

Admit paragraph II of said petition.

III.

Admit paragraph III of said petition.

IV.

Admit paragraph IV of said petition.

V.

Admit paragraph V of said petition.

VI.

Admit that the limits of liability in said policy are as shown by said Exhibit A, and except as herein admitted, deny the remainder of paragraph VI.

VII.

For answer to paragraph VII of said petition, admit that the defendant Oregon Automobile Insurance Co., a corporation of the State of Oregon, carrying on an insurance business in said State, at all times herein mentioned, had in full force and effect, a certain policy of insurance, which insured Houk Motor Company, Redmond Motor Company and Redmond Tractor Company for the period from October 1, 1949, to October 1, 1950, subject to all of the terms, provisions and conditions in said policy contained, and except as herein admitted, defendants deny the remainder of said paragraph VII, and particularly deny that said Exhibit B to said petition is a true or correct copy of said policy of insurance.

VIII.

For answer to paragraph VIII, admit that on or about the 15th day of October, 1949, the defendant Raymond Suter, was driving a certain Mercury automobile belonging to the defendant Redmond Motor Company, with the knowledge and consent of said defendant, Redmond Motor Company, and except as herein admitted, deny the remainder of said paragraph VIII.

IX.

For answer to paragraph IX thereof, admit that on or about the 15th day of October, 1949, while defendant Raymond Suter was driving said Mercury automobile, a collision occurred between said automobile and an automobile in which Beulah Morris was a passenger, as a result of which said Beulah Morris sustained certain personal injuries. Except as herein admitted, defendants deny the remainder of paragraph IX.

X.

Admit the allegations of paragraph X of said petition, except that defendants deny that said cause was numbered 7780, and in that connection allege that the cause was numbered 7784 in the Circuit Court of the State of Oregon for the county of Deschutes.

XI.

These defendants have no information as to the present status of said judgment, and therefore deny the allegations of paragraph XI of said petition.

XII.

Admit the allegations of paragraph XII of said petition.

XIII.

For answer to paragraph XIII thereof, admit that the United States Fidelity and Guaranty Company made demand upon the Oregon Automobile Insurance Company to defend the said Raymond Suter in said two actions, but deny the remainder of said paragraph, and particularly deny that said demand was adequate or timely.

XIV.

For answer to paragraph XIV thereof, defendants admit that William Morris, the driver and operator of the automobile in which Beulah Morris was riding at the time of said collision, has brought an action in the Circuit Court of the State of Oregon for the County of Deschutes, against Raymond Suter, Redmond Motor Company and James Stuchlik, for the total sum of \$9,250.00; that plaintiff herein has purported to tender to defendant Oregon Automobile Insurance Company the defense of said action on behalf of defendant Raymond Suter, and except as herein admitted, defendants deny the remainder of said paragraph XIV.

XV.

For answer to paragraph XV thereof, defendants admit that the Oregon Automobile Insurance Company has refused to defend said Raymond Suter in either of the actions brought by Beulah Morris, ad-

mit that the plaintiff herein did employ attorneys to represent the said Raymond Suter in the action brought in Marion County, admit that said cause of action in Marion County was abandoned, and except as herein admitted, deny the remainder of said paragraph XV.

XVI.

For answer to paragraph XVI thereof, defendants admit that plaintiff herein did employ an attorney to represent said Raymond Suter in the action brought by Beulah Morris in Deschutes County, and except as herein admitted, deny the remainder of said paragraph XVI.

XVII.

For answer to paragraph XVII thereof, defendants admit that plaintiff will be required to employ attorneys to defend the said Raymond Suter in the action brought by William Morris in Deschutes County, and except as herein admitted, deny the remainder of said paragraph XVII.

XVIII.

For answer to paragraph XVIII thereof, defendants admit that the defendants Raymond Suter and Oregon Automobile Insurance Company now contend that plaintiff herein is required to accept liability and defend the action brought by William Morris against Raymond Suter in the Circuit Court of the State of Oregon for the County of Deschutes, on behalf of defendant Raymond Suter, pursuant to the terms of plaintiff's said policy of insurance;

have no knowledge as to what defendants William Morris and Beulah Morris may be contending in that regard; admit that defendants William Morris, Beulah Morris, Raymond Suter and Oregon Automobile Insurance Company now contend that plaintiff herein is required to satisfy the judgment in the action of Beulah Morris against Raymond Suter, No. 7784, in Deschutes County, Oregon, up to and including the limits of plaintiff's liability under its said policy; admit that the defendant Oregon Automobile Insurance Company contends that: (a) As to the action brought by Beulah Morris in Marion County, its policy does not apply to defendant Raymond Suter, and said Oregon Automobile Insurance Company is under no obligation whatsoever with respect to his defense; (b) that with respect to the action brought in Deschutes County by said Beulah Morris, in which judgment was rendered against defendant Suter, defendant Oregon Automobile Insurance Company was under no obligation with respect to the defense of said Raymond Suter, and is under no obligation with respect to payment of said judgment against said Raymond Suter until plaintiff herein has applied upon payment of said judgment the limits of its said policy of insurance, but defendant, Oregon Automobile Insurance Company admits that after plaintiff herein has applied toward satisfaction of said judgment the limits of its said policy of insurance, defendant Oregon Automobile Insurance Company will then be obligated according to the terms and conditions of its policy with respect to the balance of said judgment then

remaining unsatisfied; (c) that with respect to the action brought in Deschutes County by William Morris, defendant Oregon Automobile Insurance Company is not obligated under its policy of insurance with respect to the cause of action for personal injuries to said William Morris or the cause of action for property damage of said William Morris, but with respect to the cause of action for loss of consortium arising out of personal injuries to Beulah Morris, defendant Oregon Automobile Insurance Company admits that after plaintiff herein has exhausted the limits of liability under its said policy of insurance, then defendant Oregon Automobile Insurance Company will be obligated under the terms and provisions of its policy with respect to said cause of action for loss of consortium. Except as herein admitted defendants deny the remainder of said paragraph XVIII.

XIX.

With respect to paragraph XIX thereof, defendants admit that plaintiff now makes the contentions therein set forth, but except as herein admitted, defendants deny the remainder of said paragraph XIX.

XX.

For answer to paragraph XX thereof, defendants admit that plaintiff now makes the contentions therein set forth, admit that defendant Oregon Automobile Insurance Company makes the contentions above set forth in paragraph XVIII hereof, and except as herein admitted, deny the remainder of said paragraph XX.

XXI.

For answer to paragraph XXI thereof, defendants admit that plaintiff now makes the contentions therein set forth, and deny the remainder of said paragraph XXI.

XXII.

For answer to paragraph XXII thereof, defendants admit that plaintiff now makes the contentions therein set forth, but deny the remainder of said paragraph XXII.

XXIII.

For answer to paragraph XXIII thereof, defendants admit that plaintiff has received a demand to defend said Raymond Suter in an action brought by Beulah Morris against Raymond Suter and others, admit that said Beulah Morris is demanding that plaintiff herein pay its full policy limits on the judgment in her favor rendered in said action in Deschutes County, and defendants have no knowledge or information sufficient to form a belief as to the remainder of said paragraph XXIII, and therefore deny the same.

XXIV.

Admit the allegations of paragraph XXIV thereof.

XXV.

Deny the allegations of paragraph XXV thereof.

XXVI.

For answer to paragraph XXVI thereof, defendants consent that an order may be entered herein

staying the action of William Morris against Raymond Suter and others, and that an order may be issued staying execution under the judgment heretofore entered in the action brought by Beulah Morris in the County of Deschutes.

Wherefore having fully answered plaintiff's petition, defendants Oregon Automobile Insurance Company, Houk Motor Company and Redmond Motor Company pray that plaintiff have no relief as against these defendants.

/s/ RANDALL B. KESTER,
Attorney for Defendants Oregon Automobile Insurance Company, Houk Motor Company and Redmond Motor Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 1, 1951.

[Title of District Court and Cause.]

ANSWER AND CROSS-COMPLAINT OF DEFENDANTS WILLIAM MORRIS AND BEULAH MORRIS

Comes now the defendants, William Morris and Beulah Morris above named, and by way of answer to plaintiff's complaint on file herein, admit, deny and allege as follows:

I.

Answering Paragraph I of plaintiff's complaint, these defendants admit the allegations therein contained.

II.

Answering Paragraph II of plaintiff's complaint, these defendants admit the allegations therein contained.

III.

Answering Paragraph III of plaintiff's complaint, these defendants admit the allegations therein contained.

IV.

Answering Paragraph IV of plaintiff's complaint, these defendants admit the allegations therein contained.

V.

Answering Paragraph V of plaintiff's complaint, defendants admit that the plaintiff for a good and valuable consideration paid to it by Raymond Suter, did make, execute and deliver to him a certain policy of insurance, which was in full force and effect on the 15th day of October, 1949; plaintiff's allege that they do not have information as to the exact contents or provisions of the said insurance policy.

VI.

Answering Paragraph VI of plaintiff's complaint, these defendants allege that they do not have any information as to the amount of coverage as set forth in said Paragraph VI in the complaint.

VII.

Answering Paragraph VII of plaintiff's complaint, these defendants admit the defendant, Oregon Automobile Insurance Company, a corporation

of the State of Oregon, was carrying on an insurance business on the 15th day of October, 1949, and prior to said time and had for a good and valuable consideration, made, executed and delivered to Houk Motor Company and Redmond Motor Company a certain policy of liability insurance, the exact provisions and contents unknown to these defendants, which was in full force and effect at the time of the collision described in the complaint, which policy covered the operation of the Mercury automobile driven by defendant, Raymond Suter, and which protected his legal liability for damages arising from the operation of the said vehicle.

VIII.

Answering Paragraph VIII of plaintiff's complaint, these defendants admit the allegations therein contained.

IX.

Answering Paragraph IX of plaintiff's complaint, these defendants admit the allegations therein contained.

X.

Answering Paragraph X of plaintiff's complaint, these defendants admit the allegations therein contained.

XI.

Answering Paragraph XI of plaintiff's complaint, these defendants admit the allegations therein contained.

XII.

Answering Paragraph XII of plaintiff's com-

plaint, these defendants admit the allegations therein contained.

XIII.

Answering Paragraph XIII of plaintiff's complaint, these defendants allege that they do not have sufficient information so as to form a belief as to the truth or falsity of the allegations therein contained and are therefore unable to answer the same, and therefore deny the allegations contained in said paragraph.

XIV.

Answering Paragraph XIV of the plaintiff's complaint, these defendants admit the allegations therein contained.

XV.

Answering Paragraph XV of plaintiff's complaint, these defendants admit the allegations therein contained.

XVI.

Answering Paragraph XVI of plaintiff's complaint, these defendants allege that do not have sufficient information so as to form a belief as to the truth or falsity of the allegations therein contained, and therefore deny the contents of said paragraph.

XVII.

Answering Paragraph XVII of plaintiff's complaint, these defendants allege that they do not have sufficient information so as to form a belief as to the truth or falsity of the allegations therein contained and therefore deny the contents of said paragraph.

XVIII.

Answering Paragraph XVIII of plaintiff's complaint, these defendants admit that they are contending that the plaintiff, United States Fidelity and Guaranty Company under and by virtue of its insurance policy, should accept liability and partially satisfy the judgment obtained in the Circuit Court of the State of Oregon for Deschutes County by Beulah Morris, and admit that the Oregon Automobile Insurance Company is claiming that it does not cover the said Raymond Suter for liability coverage by virtue of its said policy, and that the said Oregon Automobile Insurance Company is claiming and contending that it is not required to defend the said Raymond Suter or to pay any expenses or attorneys' fees and costs incidental thereto, and that the said Oregon Automobile Insurance Company is claiming that it is not responsible for payment of the judgment entered in Deschutes County, Oregon, in favor of Beulah Morris and against defendant, Raymond Suter, and that the said Company is claiming that its policy does not cover the said Raymond Suter, and defendants allege that they do not have sufficient information so as to form a belief as to the truth or falsity of the other allegations in said paragraph contained, and therefore, deny the balance of said paragraph.

XIX.

Answering Paragraph XIX of plaintiff's complaint, these defendants admit the allegations therein contained.

XX.

Answering Paragraph XX of plaintiff's complaint, these defendants allegations therein contained.

XXI.

Answering Paragraph XXI of plaintiff's complaint, these defendants admit the allegations therein contained.

XXII.

Answering Paragraph XXII of plaintiff's complaint, these defendants admit the allegations therein contained.

XXIII.

Answering Paragraph XXIII of plaintiff's complaint, these defendants admit the allegations therein contained.

XXIV.

Answering Paragraph XXIV of plaintiff's complaint, these defendants admit the allegations therein contained.

XXV.

Answering Paragraph XXV of plaintiff's complaint, these defendants admit the allegations therein contained.

XXVI.

Answering Paragraph XXVI of plaintiff's complaint, these defendants deny the allegations therein contained and the whole of said paragraph.

And by Way of a Further and Separate Answer Herein, and by Way of Cross-Complaint, defendant Beulah Morris complains and alleges as follows:

I.

That at all times herein mentioned, United States Fidelity & Guaranty Company is and was a corporation, duly organized and existing under and by virtue of the laws of the State of Maryland, and had qualified and was doing business in the State of Oregon and elsewhere, as an insurance company.

II.

That the defendants, Oregon Automobile Insurance Company, Raymond Suter, Houk Motor Company and Redmond Motor Company are residents of the State of Oregon.

III.

That the defendants, Beulah Morris and William Morris are residents of the State of Washington.

IV.

That this controversy involves an amount over and above the sum of \$3000.00, exclusive of interest, costs and attorneys' fees.

V.

That at all times herein mentioned, the plaintiff, the United States Fidelity and Guaranty Company, a corporation, for a good and valuable consideration paid to it by Raymond Suter had made, executed and delivered to the said Raymond Suter, a

certain policy of insurance covering a certain Plymouth Club Coupe automobile; that said policy was in full force and effect at all times herein mentioned, which provided that in the event that Raymond Suter was operating his automobile or another automobile and became involved in an accident, that the said insurance company would protect his legal liability for damages resulting therefrom in the amount of not less than \$5,000.00 for one injury or claim for personal injury, provided that the said Raymond Suter should be legally liable therefor.

VI.

That the defendant, Oregon Automobile Insurance Company, a Corporation, of the State of Oregon, carrying on an insurance business had for a valuable consideration, made, executed and delivered and issued to Houk Motor Company and Redmond Motor Company, a certain policy of liability insurance, which was in full force and effect at all times herein mentioned and which provided that it would protect the legal liability of Houk Motor Company and Redmond Motor Company and all other persons using any vehicles owned by the said companies with the permission of the said Houk Motor Company and/or Redmond Motor Company for legal liability for personal injuries of the one person in the amount of not less than \$100,000.00.

VII.

That on or about the 15th day of October, 1949, the defendant, Raymond Suter, at the request of

and with the full permission and knowledge of defendants, Houk Motor Company and Redmond Motor Company, was driving and operating a certain Mercury automobile, belonging to the said defendant, Houk Motor Company and/or Redmond Motor Company, bearing dealer's license # A 75.

VIII.

That on or about the 15th day of October, 1949, while so driving the said Mercury automobile, the defendant, Raymond Suter, did run into and collide with an automobile, being driven on U. S. Highway # 97, in which Beulah Morris was riding as a passenger, in such a way and manner that the said Beulah Morris did receive certain personal injuries.

IX.

That thereafter the said Beulah Morris did bring an action at law for personal injuries in the County of Deschutes, Oregon, commonly known as case # 7780, in which she named Raymond Suter, Houk Motor Company, a corporation, and James Stuchlik as defendants; that thereafter and on about the 20th day of November, 1950, the said case was tried in Deschutes County resulting in a verdict and judgment against the defendant, Raymond Suter, in the sum of \$7,360.00, a copy of which judgment as entered in Deschutes County, is hereto attached and marked the plaintiff's "Exhibit C," and by reference is made a part and parcel of this petition as though fully and completely set forth and plead at this place.

X.

That the said judgment is now in full force and effect, has not been appealed from and has not been satisfied, and that the full amount thereof, together with interests and costs of the said trial, taxed and allowed in the sum of \$114.83, is due and payable.

XI.

That subsequent to the time of the collision referred to herein which occurred on the 15th day of October, 1949, involving the said Beulah Morris and a car driven by defendant, Raymond Suter, and prior to the time that the action of Beulah Morris was filed in the Circuit Court of Deschutes County, said Oregon Automobile Insurance Company, a corporation, stated that it would accept coverage on behalf of defendant Raymond Suter, and would pay and settle the said claim of Beulah Morris, as well as the claim of William Morris; that subsequent to the time that the action of Beulah Morris was filed in the Circuit Court of the State of Oregon for the County of Deschutes, the said Oregon Automobile Insurance Company did employ an attorney to represent the said Raymond Suter and the said Oregon Automobile Insurance Company in the defense of the action brought by Beulah Morris; that during the pendency of said suit and before the time of trial said Oregon Automobile Insurance Company did represent that it would accept coverage on behalf of defendant, Raymond Suter, and would pay and settle the claim of Beulah Morris and by reason of said representa-

tions the plaintiff, United States Fidelity & Guaranty Company and defendant, William Morris, and Beulah Morris relied upon said representations were mislead and damaged, and defendant Beulah Morris, hereby contends that Oregon Automobile Insurance Company, a corporation, should be forever estopped from denying coverage and liability under the insurance policy issued by it and formerly mentioned herein.

XII.

That judgment should be entered herein by way of cross-complaint in favor of defendant Beulah Morris, and against the defendants, Oregon Automobile Insurance Company, a corporation, and Raymond Suter, and plaintiff United States Fidelity & Guaranty Company, a corporation, for the sum of \$7360.00 together with costs, taxed and allowed in the case of Beulah Morris formerly mentioned herein, in the sum of \$114.83 together with interest on said judgment and costs at the rate of 6 per cent per annum from the 27th day of November, 1950.

Wherefore, these defendants pray that the complaint of the plaintiff herein be dismissed as to them, but that judgment be entered herein in favor of Beulah Morris and against the defendants Oregon Automobile Insurance Company, a corporation, and Raymond Suter, and Plaintiff United States Fidelity & Guaranty Company, a corporation, for the sum of \$7360.00 together with costs, taxed and allowed in the sum of \$114.83, together with interest on said judgment and costs at the rate of 6 per

cent per annum from the 27th day of November, 1950, together with costs and disbursements incurred in this suit.

VERGEER & SAMUELS,

By /s/ HARRY F. SAMUELS,

Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 6, 1951.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT OREGON AUTO-
MOBILE INSURANCE COMPANY TO
CROSS-COMPLAINT OF DEFENDANT
BEULAH MORRIS

Comes now the defendant Oregon Automobile Insurance Company, and for answer to the cross-complaint filed herein by defendant Beulah Morris, admits, denies and alleges as follows:

I.

Admits the allegations of paragraph I thereof.

II.

Admits the allegations of paragraph II thereof.

III.

Admits the allegations of paragraph III thereof.

IV.

Admits the allegations of paragraph IV thereof.

V.

Admits the allegations of paragraph V thereof.

VI.

For answer to paragraph VI thereof, admits that the defendant Oregon Automobile Insurance Company, a corporation of the State of Oregon, carrying on an insurance business, had for a valuable consideration, made, executed, and delivered and issued to Houk Motor Company and Redmond Motor Company a certain policy of liability insurance, which was in full force and effect at the times therein mentioned, subject to all of the terms, provisions and conditions in said policy contained, and except as herein admitted defendant denies the remainder of said paragraph VI.

VII.

For answer to paragraph VII thereof, admits that on or about the 15th day of October, 1949, the defendant Raymond Suter was driving a certain Mercury automobile belonging to the defendant Redmond Motor Company, with the knowledge and consent of said defendant, Redmond Motor Company, and except as herein admitted, denies the remainder of said paragraph VII.

VIII.

For answer to paragraph VIII thereof, admits that on or about the 15th day of October, 1949, while defendant Raymond Suter was driving said Mercury automobile a collision occurred between said automobile and an automobile in which Beulah

Morris was a passenger, as a result of which said Beulah Morris sustained certain personal injuries. Except as herein admitted, defendant denies the remainder of said paragraph VIII.

IX.

Admits the allegations of paragraph IX thereof, except that defendant denies that said cause was numbered 7780 and in that connection allege said cause was numbered 7784 in the Circuit Court of the State of Oregon for the County of Deschutes, and except that this defendant is unable to admit or deny the allegation with respect to the contents of said judgment for the reason that said judgment was not attached to said cross-complaint as an exhibit.

X.

This defendant has no information as to the present status of said judgment, and therefore denies the allegations of paragraph X thereof.

XI.

Denies the allegations of paragraph XI thereof, and each and every part thereof, and the whole thereof.

XII.

For answer to paragraph XII thereof, admits that judgment should be entered herein in favor of defendant Beulah Morris and against the plaintiff United States Fidelity & Guaranty Company up to the full amount of the limits of plaintiff's

said policy of insurance, and denies the remainder of said paragraph XII.

Wherefore, having fully answered the cross-complaint of defendant Beulah Morris, defendant Oregon Automobile Insurance Company prays that said defendant Beulah Morris take nothing as against this defendant.

/s/ RANDALL B. KESTER,
Attorney for Defendant, Oregon Automobile Insurance Co.

Service of Copy acknowledged.

[Endorsed]: Filed February 8, 1951.

[Title of District Court and Cause.]

ORDER

February 19, 1951.

Plaintiff appearing by Mr. W. K. Phillips, of counsel, and the defendants by Mr. Randall B. Kester and Mr. Harry Samuels, of counsel.

It Is Ordered that this cause be, and is hereby set for pre-trial conference and trial Monday, March 19, 1951.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This matter having come on regularly for pre-trial conference pursuant to the rules of the above-entitled court, the Honorable Gus J. Solomon presiding: The plaintiff appearing by its attorney W. K. Phillips; the defendants Oregon Automobile Insurance Company, Houk Motor Company and Redmond Motor Company appearing by their attorney Randall B. Kester; the defendants William Morris and Beulah Morris appearing by their attorney Harry Samuels, and the parties having agreed upon the following facts and issues;

It is, based upon the said agreement and stipulation, Ordered that the agreed facts, contentions and issues be and they are hereby deemed to be as follows in this cause.

Agreed Facts

I.

That at all times herein mentioned the United States Fidelity and Guaranty Company is and was a corporation organized and existing under and by virtue of the laws of the state of Maryland, and had qualified and was doing business in the state of Oregon as an insurance company.

II.

That the defendant Oregon Automobile Insurance Company is and was at all times herein mentioned an Oregon corporation, qualified to and carrying on an insurance business within the state of Oregon.

III.

That the defendants Houk Motor Company and Redmond Motor Company were at all times herein mentioned corporations of the state of Oregon and each such corporation was carrying on an automobile sales agency and garage within the state of Oregon.

IV.

That the defendants Beulah Morris and William Morris are residents and inhabitants of the state of Washington, and are husband and wife.

V.

That the amount in controversy exceeds the sum of \$3000.00, exclusive of interest, costs and attorneys' fees.

VI.

That at all times herein mentioned the United States Fidelity and Guaranty Company had in full force and effect a certain policy of insurance which insured the defendant Raymond Suter for the period from June 4, 1949, to June 4, 1950. A copy of said policy is hereinafter identified as Pre-Trial Exhibit No. 1, and by this reference the same is incorporated herein.

VII.

That at all times herein mentioned the Oregon Automobile Insurance Company had in full force and effect a certain policy of insurance which insured the Houk Motor Company, Redmond Motor Company and Redmond Tractor Company for the period from October 1, 1949, to October 1, 1950. A

copy of said policy is hereinafter identified as Pre-Trial Exhibit No. 2, and by this reference the same is incorporated herein.

VIII.

That on or about October 15, 1949, the defendant Raymond Suter was driving and operating a certain Mercury automobile, bearing dealer's license A 75, belonging to the defendant Redmond Motor Company, with the knowledge and consent of the Redmond Motor Company. At said time a collision occurred between the vehicle Raymond Suter was operating and an automobile in which the defendant Beulah Morris was a passenger, as a result of which said Beulah Morris received certain personal injuries.

IX.

That thereafter the said defendant Beulah Morris did bring an action at law for the said personal injuries in the Circuit Court of the State of Oregon for the County of Deschutes, commonly known as case No. 7784, in which Raymond Suter, Houk Motor Company and James Stuchlik were named as defendants; that thereafter and on or about the 20th day of November, 1950, the said cause was tried, resulting in a verdict and judgment against the defendant Raymond Suter alone, in the sum of \$7,360.00, and that thereafter costs were taxed against the defendant Raymond Suter, and in favor of the plaintiff, in the sum of \$114.83.

X.

That the said judgment and cost bill are now in

full force and effect and have not been paid or satisfied and are due and payable, with interest at the rate of six per cent per annum from the 27th day of November, 1950.

XI.

That the said Beulah Morris did, during the pendency of the action in the county of Deschutes hereinabove referred to, bring an action at law for damages in the County of Marion, State of Oregon, which action was entitled, "Beulah Morris v. Raymond Suter and James Stuchlik." In said Marion county action said Beulah Morris sought to recover for the same personal injuries, arising from the same accident, as alleged in said Deschutes county action. Said Marion county action was abandoned by the plaintiff therein, and an order of voluntary nonsuit was entered prior to the trial of the Deschutes county action above mentioned.

XII.

On or about, defendant William Morris, who was the owner and driver of the automobile in which Beulah Morris was riding at the time of said accident, commenced an action in the Circuit Court of the State of Oregon for the county of Deschutes, against Raymond Suter, Redmond Motor Company and James Stuchlik, defendants, No., wherein judgment is demanded against said defendants in the following amounts: Personal injuries to William Morris, \$1500.00; property damage to his automobile, \$250.00; loss of

consortium by reason of the injuries to Beulah Morris, \$7500.00; together with costs and disbursements. Said action is now pending.

XIII.

With respect to the action brought in Marion County by Beulah Morris, plaintiff employed attorneys who represented said Raymond Suter, and plaintiff paid to said attorneys a reasonable fee and costs advanced in the total sum of \$223.20.

XIV.

With respect to the action brought in Deschutes county by Beulah Morris, plaintiff employed attorneys who represented said Raymond Suter, and plaintiff paid to said attorneys a reasonable fee and costs advanced in the total sum of \$428.80, and plaintiff paid an additional sum of \$97.83 as expenses.

XV.

A controversy exists with respect to the applicability of said policies of insurance to said actions and any liability of defendant Raymond Suter, as shown by the contentions of the parties hereinafter set forth, and as shown by the correspondence which is hereinafter identified as exhibits 11 to 19, inclusive.

Contentions of the Parties

Plaintiff contends:

I.

That under the terms of its policy it did not nor does insure the defendant Raymond Suter, except

as excess insurance, and that it has no liability to the defendants Raymond Suter, Beulah Morris, or William Morris until the defendant Oregon Automobile Insurance Company has expended the limits of its said insurance policy.

II.

That under the terms of the said insurance policy written by the Oregon Automobile Insurance Company, it is required to pay and satisfy the judgment, costs and interest rendered in favor of the defendant Beulah Morris against Raymond Suter entered in Deschutes County on or about the 27th day of November, 1950.

III.

That under the terms of its policy the Oregon Automobile Insurance Company is required to accept liability for and defend the defendant Raymond Suter in the action now pending in Deschutes County, Oregon, to wit: "William Morris vs. Raymond Suter, Redmond Motor Company and James Stuchlik."

IV.

That the defendant Oregon Automobile Insurance Company is indebted to the plaintiff in the sum of \$745.83, together with interest thereon at the rate of six per cent per annum from December 1, 1950, until paid.

V.

That the plaintiff is entitled to a reasonable attorney fee in this cause and should be permitted to petition therefore at the time of entering a decree.

VI.

That the Oregon Automobile Insurance Company was obligated to accept liability for and defend Raymond Suter in the action brought by Beulah Morris in Marion County, Oregon.

VII.

That the plaintiff is not obligated to the defendants Beulah Morris, William Morris or Raymond Suter in any way.

VIII.

That the defendant Beulah Morris is not entitled to recover a reasonable attorneys' fee in this cause against the plaintiff herein.

The defendants Beulah Morris and William Morris contend:

I.

That the plaintiff and defendant Oregon Automobile Insurance Company, by virtue of their insurance policies, are required to protect the legal liability for damages caused by the negligence of the defendant Raymond Suter, to the full extent of the coverage disclosed by the said policies.

II.

That the defendant Oregon Automobile Insurance Company is estopped to deny primary coverage to Raymond Suter in the actions brought by Beulah Morris and William Morris.

III.

That the defendant Beulah Morris is entitled to

recover a reasonable attorneys' fee in this cause and should be entitled to petition therefore at the time of entering a decree herein.

Defendants Houk Motor Company, Redmond Motor Company and Oregon Automobile Insurance Company contend:

I.

That with respect to the action brought by Beulah Morris in Marion County, the policy of Oregon Automobile Insurance Company does not apply to defendant Raymond Suter, and said Oregon Automobile Insurance Company was and is under no obligation whatsoever with respect to his defense, or any expense arising therefrom.

II.

That with respect to the action brought in Deschutes county by said Beulah Morris, in which judgment was rendered against defendant Suter, defendant Oregon Automobile Insurance Company was under no obligation with respect to the defense of said Raymond Suter, and is under no obligation with respect to the expense thereof or to payment of said judgment against said Raymond Suter, costs or interest, until plaintiff herein has applied upon payment of said judgment the limits of its said policy of insurance, but defendant Oregon Automobile Insurance Company admits that after plaintiff herein has applied toward satisfaction of said judgment the limits of its said policy of insurance, defendant Oregon Automobile Insurance Company will then

be obligated according to the terms and conditions of its policy with respect to the balance of said judgment then remaining unsatisfied.

III.

That with respect to the action brought in Deschutes County by William Morris, defendant Oregon Automobile Insurance Company is not obligated under its policy of insurance as to defendant Raymond Suter with respect to the cause of action for personal injuries to said William Morris or the cause of action for property damage of said William Morris; nor with respect to the cause of action for loss of consortium arising out of personal injuries to Beulah Morris, until plaintiff has exhausted the limits of its policy of insurance. But defendant Oregon Automobile Insurance Company admits that after plaintiff herein has exhausted the limits of liability under its said policy of insurance, with respect to claims arising out of injuries to Beulah Morris, then defendant Oregon Automobile Insurance Company will be obligated under the terms and provisions of its policy with respect to said cause of action for loss of consortium.

IV.

That plaintiff herein is required to accept liability and defend the action brought by William Morris against Raymond Suter in the Circuit Court of the State of Oregon for the County of Deschutes, on behalf of defendant Raymond Suter, pursuant to the terms of plaintiff's said policy of insurance.

V.

That plaintiff herein is required to satisfy the judgment in the action of Beulah Morris against Raymond Suter, No. 7784, in Deschutes County, Oregon, up to and including the limits of plaintiff's liability under its said policy.

VI.

That the defendant Oregon Automobile Insurance Company is not indebted to the plaintiff in any amount.

VII.

That the defendant Oregon Automobile Insurance Company is not indebted to defendant Beulah Morris in any amount at this time, and will not be indebted to her in any amount until plaintiff has exhausted the limits of liability of its insurance as to the judgment in her favor in Deschutes county.

VIII.

That neither the plaintiff nor the defendants Beulah Morris or William Morris are entitled to recover attorneys' fees in this cause from the Oregon Automobile Insurance Company.

IX.

That the policy of plaintiff was and is valid and collectible insurance available to and covering said Raymond Suter with respect to liability arising out of said accident, within the meaning of the policy of Oregon Automobile Insurance Company.

X.

That the policy of Oregon Automobile Insurance Company was not and is not valid and collectible insurance available to or covering said Raymond Suter with respect to liability arising out of said accident.

XI.

(a) That defendant Oregon Automobile Insurance Company is not estopped to assert the contentions herein set forth; and

(b) That any alleged estoppel cannot be used to modify the terms, provisions or conditions of the policy of Oregon Automobile Insurance Company or to extend the coverage provided therein.

Questions to Be Determined

1. Is the policy of insurance written by the United States Fidelity & Guaranty Company a primary coverage or excess to that policy written by the Oregon Automobile Insurance Company?

2. Is the Oregon Automobile Insurance Company's policy primary or excess to the one written by the United States Fidelity & Guaranty Company?

3. What are the obligations of the United States Fidelity and Guaranty Company under the terms of its policy, with respect to each of the three cases herein mentioned?

4. What are the obligations of the Oregon Automobile Insurance Company under the terms of its policy, with respect to each of the three cases herein mentioned?

5. Is either policy valid and collectible insurance within the meaning of the other policy, under the circumstances of this case?

6. Is the Oregon Automobile Insurance Company indebted to the plaintiff and if so in what amount?

7. Is either insurance company indebted to defendant Beulah Morris, and if so in what amounts respectively?

8. Is the defendant Beulah Morris entitled to a reasonable attorneys' fee against the Oregon Automobile Insurance Company in this cause?

9. Is the defendant Beulah Morris entitled to a reasonable attorneys' fee in this cause against the plaintiff?

10. Is the plaintiff entitled to recover a reasonable attorney's fee against the defendant Oregon Automobile Insurance Company in this cause?

11. Can estoppel be used to modify the terms, provisions or conditions of the policy of Oregon Automobile Insurance Company, or to extend the coverage provided therein?

12. If so, is the defendant Oregon Automobile Insurance Company estopped to assert any or all of its contentions herein?

Exhibits

The following exhibits were identified by the parties. All objections as to identification or authenticity are waived unless hereinafter noted, but

all objections as to competency, relevancy or materiality are reserved to the time of trial.

1. Copy of United States Fidelity & Guaranty policy covering Raymond Suter.

2. Photostatic copy of Oregon Automobile Insurance policy covering Houk Motor Company and Redmond Motor Company.

3. United States Fidelity & Guaranty "Daily" covering Raymond Suter.

4. Copy of Judgment Order entered in Deschutes County, Oregon, in favor of Beulah Morris and against the defendant Raymond Suter.

5. Copy of Cost Bill entered in Deschutes County, Oregon.

6. Copy of Complaint filed by Beulah Morris in Marion County, Oregon.

7. Copy of Affidavit and Motion for a change of venue filed by Raymond Suter.

8. Duplicate draft payable to George Brewster issued by the plaintiff as attorney fees and costs in the Deschutes County trial.

9. Duplicate draft issued by the plaintiff as attorney fees and costs to Phillips, Hodler & Sandeberg in the Marion County case.

10. Duplicate expense drafts issued by the United States Fidelity and Guaranty in the Deschutes County case.

11. Copy of letter dated September 5, 1950, written by W. K. Phillips to the Oregon Automobile Insurance Company.

12. Letter dated September 12, 1950, written by Randall B. Kester to the plaintiff United States Fidelity & Guaranty.

13. Copy of letter written by W. K. Phillips to Maguire, Shields, Morrison and Bailey dated September 20, 1950.

14. Copy of letter dated November 7, 1950, written by W. K. Phillips to Maguire, Shields, Morrison and Bailey.

15. Letter written by Randall B. Kester to Phillips, Hodler & Sandeberg dated November 9, 1950.

16. Letter addressed to Oregon Automobile Insurance Company signed by Ray E. Suter, dated November 16, 1950.

17. Copy of a letter written by Randall B. Kester to Ray Suter dated November 17, 1950.

18. Letter written by Jos. A. Boyce on behalf of United States Fidelity & Guaranty Company to Oregon Automobile Insurance Company, dated December 19, 1950.

19. Copy of letter written by Randall B. Kester to United States Fidelity & Guaranty Company, dated January 9, 1950.

20. Letter from George Brewster to Wendell K. Phillips dated September 11, 1950.

21. Letter from George Brewster to Wendell K. Phillips dated September 14, 1950.

22. Written memorandum of United States Fidelity & Guaranty Co. in regard to coverage advice by the Oregon Automobile Insurance Company.

23. Letter July 8, 1950, Geo. Brewster to U.S.F.&G.

The foregoing is the pre-trial order agreed upon at a conference between the court and counsel. It supersedes the pleadings, which are hereby amended to conform hereto. It shall not be amended except by consent, or by order of the court to prevent manifest injustice.

Done in open court at Portland, Oregon, this 19th day of March, 1951.

/s/ GUS J. SOLOMON,
U. S. District Judge.

Approved:

/s/ W. K. PHILLIPS,
Of Attorneys for Plaintiff.

/s/ HARRY F. SAMUELS,
Of Attorneys for Defendants William Morris and
Beulah Morris.

/s/ RANDALL B. KESTER,
Of Attorneys for Defendants Oregon Automobile
Insurance Co., Houk Motor Company and Red-
mond Motor Co.

[Endorsed]: Filed March 19, 1951.

ORAL OPINION

March 28, 1951

In the case of United States Fidelity and Guaranty Co., plaintiff, vs. Oregon Automobile Insurance Co., et al., defendants, Civil No. 5890, I find that the automobile liability policy issued by defendant Oregon Auto Insurance Company is the primary insurance and creates liability up to its policy limits. The policy issued by the plaintiff is excess to that of the policy written by defendant, Oregon Auto.

Defendant, Oregon Auto, is therefore liable for the payment of the Judgment recovered in the State Court by Beulah Morris against defendant, Raymond Suter, in the sum of \$7,360.00 plus costs and interest.

Defendant, Oregon Auto, under its policy is likewise required to defend the action filed in the State Court by defendant, William Morris, for personal injury, property damage, and loss of consortium by reason of the injuries to his wife, Beulah Morris.

As to the other issues in the case, I will receive any evidence that the parties desire to introduce and will hear argument on Monday, April 2, 1951, at 2 p.m.

[Title of District Court and Cause.]

ORDER

March 28, 1951.

Now at this day the Court renders its opinion herein.

It Is Ordered that this cause be, and is hereby, set for further argument Monday, April 2, 1951, at two o'clock p.m.

[Title of District Court and Cause.]

PETITION FOR ATTORNEY'S FEES

Come now the defendants and cross-complainants, William Morris and Beulah Morris, and Harry F. Samuels, their attorney, and respectfully show to the Court that the defendants and cross-complainants William Morris and Beulah Morris, did heretofore employ the said Harry F. Samuels as their attorney to represent them in defending the above declaratory judgment suit brought by the United States Fidelity and Guaranty Company, a corporation, and to prosecute the cross-complaint heretofore filed herein; and respectfully show that the said Harry F. Samuels is an attorney of good standing before this bar and as attorney for William Morris and Beulah Morris, did undertake said employment, and did prepare an answer and cross-complaint heretofore filed herein, and did assist in preparing a proposed pre-trial order and did try the said suit, resulting in a decree and judgment rendered herein in favor of defendants William Morris and

Beulah Morris, upon their cross-complaint, and against the defendant Oregon Automobile Insurance Company, whereby under the terms of said judgment the sum of \$7,360.00, together with interest upon the costs filed in the judgment obtained in the Circuit Court of Deschutes County, may now be collectible, together with interest thereon.

That under and by virtue of Oregon Compiled Laws Annotated, Section 101-134 and the broad equitable jurisdictions in matters of this kind and nature, the said defendants William Morris and Beulah Morris and their Attorney, Harry F. Samuels, do and hereby do petition this Court for the allowance of reasonable attorney's fees against the Oregon Automobile Insurance Company, a corporation, and petition that the said allowance of attorney's fees be made a part and parcel of the final decree and judgment of this Court to be hereinafter entered in this cause.

That due to the amount of work involved and performed by the said attorney representing these petitioners, and the importance of the litigation to these petitioners, and the amount of money involved in this matter, and the fact that these petitioners had already obtained a good and valid judgment in the Circuit Court of the State of Oregon for Deschutes County, which said judgment should have been paid by the Oregon Automobile Insurance Company, a corporation, under the terms of its insurance policy, without subjecting these petitioners to any inconvenience or expense relative to the collection of the

same, your petitioners believe, allege and respectfully urge that the sum of \$1500.00 represents a reasonable sum to be allowed to them as attorney's fees herein for the defense of the action brought by the United States Fidelity and Guaranty Company, a corporation, and the prosecution of the cross-complaint herein, and respectfully petition that this amount be allowed as attorney's fees for the defense of the said action and prosecution of the said cross-complaint.

Wherefore, your petitioners respectfully pray that the above Honorable Court enter an Order directing that the defendants William Morris and Beulah Morris and Harry F. Samuels, your petitioners herein, be allowed the full sum of \$1500.00 as reasonable attorney's fees herein or such other sums as the Court may deem just to be paid by the defendant Oregon Automobile Insurance Company to your petitioners.

Respectfully submitted,

/s/ HARRY F. SAMUELS,
Attorney for Defendants and Cross-Complainants
William Morris and Beulah Morris.

Duly verified.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 30, 1951.

[Title of District Court and Cause.]

PETITION FOR ATTORNEY'S FEES

Come now the plaintiff, United States Fidelity and Guaranty Company, a corporation, and W. K. Phillips, its attorney, and respectfully shows to the court that the United States Fidelity and Guaranty Company did heretofore employ W. K. Phillips as its attorney to represent it in bringing a declaratory judgment suit in the above-entitled court for the purpose of enforcing a certain policy of insurance made and executed by the defendant, Oregon Automobile Insurance Company, and that the said W. K. Phillips, an attorney of good standing before this bar, did as the attorney for the plaintiff herein, undertake said employment and did prepare each, every and all pleadings in the above-entitled suit and did prepare a proposed pre-trial order, did try the said suit resulting in a decree and judgment rendered against the defendant, Oregon Automobile Insurance Company, upholding the contentions of this plaintiff.

That under and by virtue of Oregon Compiled Laws Annotated, Section 101-134 and the broad equitable jurisdiction in matters of this kind and nature, the said plaintiff, United States Fidelity & Guaranty Company, and its attorney, W. K. Phillips, do and do hereby petition this court for the allowance of reasonable attorney's fees against the Oregon Automobile Insurance Company, and that the said allowance of attorney's fees be made a part

and parcel of the final decree and judgment of this court to be hereinafter entered in this cause.

That due to the amount of work involved and importance of the litigation and the result obtained, your petitioners believe and respectfully urge that the sum of \$1,500.00 be allowed as attorney's fees herein for the prosecution of the above suit.

Wherefore, your petitioners respectfully pray that the above honorable court enter an order directing that the plaintiff and W. K. Phillips, your petitioners, be allowed the full sum of \$1,500.00 as reasonable attorney's fees herein, or such other sum as the court may deem just to be paid by the defendant, Oregon Automobile Insurance Company, to your petitioners.

Respectfully submitted,

/s/ W. K. PHILLIPS,
Attorney for Plaintiff.

Service of Copy acknowledged.

[Endorsed]: Filed March 30, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The above case and cause having come on regularly for trial on the 19th day of March, 1951, and thereafter continued until the 2nd day of April, 1951, before the Honorable Gus J. Solomon pre-

siding and the following having appeared: The plaintiff United States Fidelity and Guaranty Company, by W. K. Phillips, its attorney; the defendants Oregon Automobile Insurance Company, Houk Motor Company and Redmond Motor Company, by their attorney Randall Kester; the defendants William Morris and Beulah Morris by their attorney Harry Samuels; the defendant Raymond Suter not appearing. And, each of the parties by and through their attorneys having signed the pre-trial order in open court and the same being approved by the Honorable Gus J. Solomon, and evidence having been presented and arguments having been made and the court now being fully informed in the premises, the court now does make the following:

Findings of Facts

I.

That at all times herein mentioned the United States Fidelity and Guaranty Company is and was a corporation organized and existing under and by virtue of the laws of the state of Maryland, and had qualified and was doing business in the state of Oregon as an insurance company.

II.

That the defendant Oregon Automobile Insurance Company is and was at all times herein mentioned an Oregon corporation, qualified to and carrying on an insurance business within the state of Oregon.

III.

That the defendants Houk Motor Company and Redmond Motor Company were at all times herein mentioned corporations of the state of Oregon and each such corporation was carrying on an automobile sales agency and garage within the state of Oregon.

IV.

That the defendants Beulah Morris and William Morris are residents and inhabitants of the state of Washington, and are husband and wife.

V.

That this court does have and take jurisdiction of this suit.

VI.

That at all times herein mentioned the United States Fidelity and Guaranty Company had in full force and effect a certain policy of insurance which insured the defendant Raymond Suter for the period from June 4, 1949, to June 4, 1950. A copy of said policy is hereinafter identified as Pre-trial Exhibit No. 1.

VII.

That at all times herein mentioned the Oregon Automobile Insurance Company had in full force and effect a certain policy of insurance which insured the Houk Motor Company, Redmond Motor Company and Redmond Tractor Company for the period from October 1, 1949, to October 1, 1950. A copy of said policy is hereinafter identified as Pre-trial Exhibit No. 2.

VIII.

That on or about October 15, 1949, the defendant Raymond Suter was driving and operating a certain Mercury automobile, bearing dealer's license A75, belonging to the defendant, Redmond Motor Company, with the knowledge and consent of the Redmond Motor Company. At said time a collision occurred between the vehicle Raymond Suter was operating and an automobile in which the defendant Beulah Morris was a passenger, as a result of which said Beulah Morris received certain personal injuries.

IX.

That thereafter the said defendant Beulah Morris did bring an action at law for the said personal injuries in the Circuit Court of the State of Oregon for the County of Deschutes, commonly known as case No. 7784, in which Raymond Suter, Houk Motor Company and James Stuchlik were named as defendants; that thereafter and on or about the 20th day of November, 1950, the said cause was tried, resulting in a verdict and judgment against the defendant Raymond Suter alone, in the sum of \$7,360.00, and that thereafter costs were taxed against the defendant Raymond Suter, and in favor of the plaintiff, in the sum of \$114.83.

X.

That the said judgment and cost bill are now in full force and effect and have not been paid or satisfied and are due and payable, with interest at the rate of six per cent per annum from the 27th day of November, 1950.

XI.

That the said Beulah Morris did, during the pendency of the action in the county of Deschutes hereinabove referred to, bring an action at law for damages in the County of Marion, State of Oregon, which action was entitled, "Beulah Morris v. Raymond Suter and James Stuchlik." In said Marion county action said Beulah Morris sought to recover for the same personal injuries, arising from the same accident, as alleged in said Deschutes county action. Said Marion county action was abandoned by the plaintiff therein, and an order of voluntary nonsuit was entered prior to the trial of the Deschutes county action above mentioned.

XII.

On or about December 6, 1950, defendant William Morris, who was the owner and driver of the automobile in which Beulah Morris was riding at the time of said accident, commenced an action in the Circuit Court of the State of Oregon for the county of Deschutes, against Raymond Suter, Redmond Motor Company and James Stuchlik, defendants, No. 8007, wherein judgment is demanded against said defendants in the following amounts: personal injuries to William Morris, \$1,500.00; property damage to his automobile, \$250.00; loss of consortium by reason of the injuries to Beulah Morris, \$7,500.00; together with costs and disbursements. Said action is now pending.

XIII.

With respect to the action brought in Marion

County by Beulah Morris, plaintiff employed attorneys who represented said Raymond Suter, and plaintiff paid to said attorneys a reasonable fee and costs advanced in the total sum of \$223.20.

XIV.

With respect to the action brought in Deschutes county by Beulah Morris, plaintiff employed attorneys who represented said Raymond Suter, and plaintiff paid to said attorneys a reasonable fee and costs advanced in the total sum of \$428.80, and plaintiff paid an additional sum of \$97.83 as expenses.

XV.

That the defendant Oregon Automobile Insurance Company did investigate the accident hereinabove referred to and did defend the defendants Houk Motor Company in the Deschutes County action of Beulah Morris vs. Raymond Suter, Houk Motor Company and James Stuchlik, case #7784.

XVI.

That the defendant Oregon Automobile Insurance Company has not paid to Beulah Morris nor the United States Fidelity and Guaranty Company any amount of money whatsoever on either the judgment, costs, interests, attorneys' fees or expenses.

XVII.

That the material paragraphs of the Oregon Automobile Insurance Company's policy reads as follows, to wit:

"Additional Assured. The insurance granted by Clauses E and F shall in the same manner and

under the same conditions, declarations and exclusions as to the assured, apply to any person while legally operating any automobile described in the 'Schedule of Warranties' with the permission of the Assured, and also to any person, firm or corporation legally responsible for the use thereof, provided the declared and actual use of the automobile is 'Business and Pleasure' or 'Commercial' each as defined herein, and provided furthermore the actual use is with the permission of the named Insured, (provided that any Additional Insured who is covered by valid and collectible insurance against a claim also covered hereby shall have no right of recovery under this policy); provided further that in the event that the Assured and/or the Additional Assured suffer bodily injury, or death, or damage to property through the act or omission of any other person occupying or operating said automobile, such person shall not be an Additional Assured within the terms or conditions of this policy; provided further that in the event a person who would otherwise be an Additional Assured by reason of having been given permission to operate the car shall permit another to operate the car, neither party shall be an Additional Assured or be entitled to coverage under this policy. The insurance herein granted to such Additional Assured shall be subject to all of the conditions, declarations and exclusions of this policy, and said conditions, declarations and exclusions shall apply to and be binding upon the Additional Assured in the same manner and with the same effect as to and upon the Assured, and it shall be the duty

of the Additional Assured to comply with and perform all of the conditions and requirements of this policy. If an automobile covered by this policy is sold or transferred, the indemnity provided herein shall not extend to such purchaser or transferee, unless the interest in the policy is assigned in accordance with all the conditions relating to the manner of such transfer.

“Other Insurance. If the Insured has other insurance against a loss covered by this policy the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the Warranties bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, that the insurance under Paragraph ‘Drive Other Private Passenger Automobiles’ shall be excess insurance over any other valid and collectible insurance available to the Insured, either as an insured under a policy applicable with respect to the automobile or otherwise, against a loss covered under said paragraph; and further this company will not be liable if any other person, firm or corporation indemnified hereunder is covered by valid and collectible insurance against a claim also covered by this policy, such other person, firm or corporation shall not be indemnified under this policy.”

XVIII.

That the material paragraphs of the plaintiff's policy reads as follows, to wit:

“Use of Other Automobiles: If the named insured

is an individual who owns the automobile classified as 'pleasure and business' or husband and wife either or both of whom own said automobile, such insurance as is afforded by this policy with respect to said automobile applies with respect to any other automobile, subject to the following provisions:

“(a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word ‘Insured’ includes

“(1) Such Named Insured, (2) the spouse of such individual if a resident of the same household and (3) any other person or organization legally responsible for the use by such Named Insured or spouse of an automobile not owned or hired by such other person or organization. Insuring Agreement III, Definition of Insured, does not apply to this insurance.

“Other Insurance—Coverages A and B. If the Insured has other insurance against a loss covered by this policy the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to temporary substitute automobiles under the Insuring Agreement IV shall be excess insurance over any other valid and collectible insurance available to the Insured, either as an Insured under a policy applicable with respect to said automobiles or otherwise.”

XIX.

That the plaintiff the United States Fidelity & Guaranty did tender to the defendant, Oregon Automobile Insurance Co., the defense of Raymond Suter in the Deschutes County action of "Beulah Morris vs. Raymond Suter, Houk Motor Company, and James Stuchlik" and also the defense of the said Raymond Suter in the action brought by Beulah Morris in the County of Marion, entitled "Beulah Morris vs. Raymond Suter and James Stuchlik," and did demand that the Oregon Automobile Insurance Company pay the expenses of defending each of the said actions and pay any resulting judgment in either of the said actions, and accept coverage under their policy.

XX.

That the plaintiff, U. S. Fidelity & Guaranty Company, did tender to the defendant Oregon Automobile Insurance Company the defense of Raymond Suter in the action brought by William Morris vs. Raymond Suter, Redmond Motor Company and James Stuchlik, and did demand that the said Oregon Automobile Insurance Company accept coverage under the provisions of their policy and defend the said Raymond Suter in said action.

XXI.

That the defendant, Oregon Automobile Insurance Company, did and has denied coverage under its policy and did and has refused to defend the said Raymond Suter, or to pay any of the costs or expenses of his defense and has denied any and all

liability under its said policy to the said Raymond Suter, and has and does now refuse to reimburse the plaintiff U. S. Fidelity & Guaranty Company for the costs and expenses advanced by it in the defense of the said Raymond Suter.

Based on the above Findings of Fact, this court does make and enter the following:

Conclusion of Law

I.

That the Oregon Automobile Insurance Company by virtue of its policy of insurance, Pre-trial Ex. 2, did insure and cover Raymond Suter and did protect him against legal liability for damages arising out of the accident which occurred on the 15th day of October, 1949, between the Mercury automobile which he was driving and that driven by William Morris, in Deschutes County, Oregon.

II.

That by virtue of its policy of insurance, the Oregon Automobile Insurance Company was required to defend the said Raymond Suter in all actions brought against him for damages arising out of that said accident and to pay all expenses of his defense, and any resulting judgments rendered against him up to the limits of their disclosed liability, but not more than One Hundred Thousand (\$100,000.00) Dollars, and costs of defense.

III.

That the policy of the Oregon Automobile Insur-

ance Company, provides the primary coverage and insurance insuring the said Raymond Suter, and that policy written by the U. S. Fidelity and Guaranty Company, "Pre-trial Ex. I," is excess insurance and secondary to that provided by the defendant, Oregon Automobile Insurance Company, and that there is not, nor was there any liability on the part of the U. S. Fidelity & Guaranty Company to defend Raymond Suter, or pay any judgments against him until the Oregon Automobile Insurance Company had expended the full amount of its coverage.

IV.

That Beulah Morris is entitled to recover off of and from the defendant, Oregon Automobile Insurance Company, the sum of Seven Thousand Four Hundred Seventy-four and 83/100 (\$7,474.83) Dollars, together with interest thereon at the rate of (6%) Six per cent per annum from the 20th day of November, 1950.

V.

That Beulah Morris is entitled to recover off of and from the defendant, Oregon Automobile Insurance Company, the sum of Two Hundred and Fifty (\$250.00) Dollars attorneys fees for prosecuting their declaratory judgment suit.

VI.

That the plaintiff the U. S. Fidelity and Guaranty Company is entitled to recover off of and from the defendant, Oregon Automobile Insurance Company, the sum of Seven Hundred Forty-five

and 83/100 (\$745.83) Dollars, together with interest thereon at the rate of (6%) Six per cent per annum from the 26th day of December, 1950.

VII.

That Beulah Morris is not entitled to any recovery from the plaintiff, the U. S. Fidelity and Guaranty Company.

VIII.

That none of the parties hereto shall recover costs or disbursements in this cause.

Dated this 19th day of July, 1951.

/s/ GUS J. SOLOMON,
U. S. District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 19, 1951.

In the United States District Court
for the District of Oregon

Civil No. 5890

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,
Plaintiff,

vs.

OREGON AUTOMOBILE INSURANCE COM-
PANY, RAYMOND SUTER, WILLIAM
MORRIS, BEULAH MORRIS, HOUK MO-
TOR COMPANY and REDMOND MOTOR
COMPANY,

Defendants.

JUDGMENT AND DECREE

The above-entitled cause having come on regularly for trial on the 28th day of March, 1951, and thereafter concluded on the 2nd day of April, 1951, before the undersigned Judge of the above-entitled Court, and this Honorable Court having heretofore found, made and entered its Findings of Fact and Conclusions of Law and based upon the said Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed as follows:

I.

That the insurance policy issued by the Oregon Automobile Insurance Company, policy #332583, did insure and cover Raymond Suter and that the said Oregon Automobile Insurance Company is re-

quired to pay on behalf of the said Raymond Suter all sums which he became legally obligated to pay, and all damages and costs assessed against him, because of personal injury or property damages sustained and suffered by either or both William Morris and Beulah Morris by virtue of that said accident which happened on or about the 15th day of October, 1949, in the County of Deschutes, State of Oregon.

II.

That the said policy of insurance written by the Oregon Automobile Insurance Company is primary insurance for the benefit of the said Raymond Suter, and the policy made, executed and delivered by the plaintiff, United States Fidelity and Guaranty Company, is excess insurance to that written by the Oregon Automobile Insurance Company, or secondary, and that the plaintiff, United States Fidelity and Guaranty Company, is not required to pay or to assume any obligation whatsoever by virtue of its policy for the legal liability of Raymond Suter to William Morris and/or Beulah Morris until such time as the Oregon Automobile Insurance Company has expended the full face of its policy, namely, \$100,000.00.

III.

That the defendant, Beulah Morris, have judgment against the Oregon Automobile Insurance Company in the sum of \$7,360.00, plus costs in the sum of \$114.43, together with interest on the said sums at the rate of (6%) six per cent per annum from the 27th day of November, 1950.

IV.

That Beulah Morris have judgment against the defendant, Oregon Automobile Insurance Company, in the sum of Two Hundred and Fifty (\$250.00) Dollars attorneys fees herein.

V.

That the plaintiff, United States Fidelity and Guaranty Company, have judgment against the defendant, Oregon Automobile Insurance Company, for the sum of Seven Hundred Forty-five and 83/100 (\$745.83) Dollars, together with interest thereon, at the rate of (6%) six per cent per annum from the 26th day of December, 1950.

VI.

That Beulah Morris recover nothing off of and from the plaintiff, the United States Fidelity and Guaranty Company.

VII.

That no costs be allowed to any party.

VIII.

That the terms and provisions of this decree and judgment be carried out and enforced and that execution issue immediately.

Done in open court this 19th day of July, 1951.

/s/ GUS J. SOLOMON,

United States District Judge.

[Endorsed]: Filed July 19, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Oregon Automobile Insurance Company, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment and Decree entered in this action on July 19, 1951.

/s/ RANDALL B. KESTER,

MAGUIRE, SHIELDS,
MORRISON & BAILEY,
Attorneys for Appellant.

[Endorsed]: Filed August 13, 1951.

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Know All Men by These Presents, that we, Oregon Automobile Insurance Company, as principal, and United Pacific Insurance Company, a corporation organized and existing under the laws of the State of Washington, and licensed to do a surety business in the State of Oregon, as surety, are held and firmly bound unto defendant, Beulah Morris, her heirs, representatives and assigns, in the full sum of Nine Thousand Dollars (\$9,000.00), and unto plaintiff, United States Fidelity and Guaranty Company, its successors and assigns, in the full sum of One Thousand Dollars (\$1,000.00); to which pay-

ments, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

The condition of the above obligation is such that whereas, on the 19th day of July, 1951, a final judgment and decree was entered in the above-entitled court and cause against defendant, Oregon Automobile Insurance Company, and said defendant has commenced an appeal therefrom to the United States Court of Appeals for the Ninth Circuit. Now, Therefore, if said defendant, Oregon Automobile Insurance Company, shall satisfy said judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, then the above obligation shall be void; otherwise it shall remain in full force and effect.

Sealed with our seals and dated this 13th day of August, 1951.

[Seal]

OREGON AUTOMOBILE
INSURANCE COMPANY,

By /s/ MAXWELL N. UNGER,
Principal.

[Seal]

UNITED PACIFIC
INSURANCE COMPANY,

By /s/ C. S. McDONALD,
Attorney in Fact.

Countersigned at Portland, Oregon.

[Seal] WALTER J. PEARSON & CO.,
General Agents.

By /s/ WALTER J. PEARSON,
Pres., Resident Agent.

Form of bond and sufficiency of surety approved
this 15th day of August, 1951.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed August 17, 1951.

[Title of District Court and Cause.]

TRANSMITTAL OF EXHIBITS

On motion of defendant-appellant, Oregon Automobile Insurance Company, and good cause appearing therefor, it is hereby

Ordered, that the Clerk of this Court forward to the United States Court of Appeals for the Ninth Circuit, in connection with the appeal of this cause, all of the original papers and exhibits, in accordance with the usual practice of this court in regard to the safekeeping and transportation of such papers and exhibits.

Done this 15th day of August, 1951.

/s/ GUS J. SOLOMON,
Judge.

Service of Copy acknowledged.

[Endorsed]: Filed August 17, 1951.

United States District Court,
District of Oregon

No. Civil 5890

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,

Plaintiff,

vs.

OREGON AUTOMOBILE INSURANCE COM-
PANY, RAYMOND SUTER, WILLIAM
MORRIS, BEULAH MORRIS, HOUK MO-
TOR COMPANY and REDMOND MOTOR
COMPANY,

Defendants.

March 19, 1951

Before: Honorable Gus J. Solomon,
Judge.

Appearances:

W. K. PHILLIPS,

Of Attorneys for Plaintiff.

RANDALL B. KESTER,

Of Attorneys for Defendants Oregon Auto-
mobile Insurance Company, Houk Motor
Company and Redmond Motor Company.

HARRY F. SAMUELS,

Of Attorneys for Defendants William Mor-
ris and Beulah Morris.

TRANSCRIPT OF PROCEEDINGS

The Court: U. S. Fidelity and Guaranty Company vs. Oregon Automobile Insurance Company.

Is any testimony going to be taken in this case?

Mr. Phillips: I don't think so, your Honor. What has occurred, last February I submitted a proposed pre-trial order, and this morning Mr. Kester just submitted another one and I have not had an opportunity to digest it. I presume it is all right unless there are some radical changes.

As I view the case, the only thing we are interested in is your interpretation of two paragraphs of the two insurance policies.

The Court: The interpretation of two paragraphs of the policies?

Mr. Phillips: That is all, your Honor. Mr. Kester just furnished me now with a copy of the Oregon Automobile Insurance Company's policy.

The Court: I don't know that I understand what the case is about. I just looked at it generally. Is it a garage policy, liability policy?

Mr. Phillips: Yes, your Honor. I can give you a recital of the facts, if you desire.

The Court: All right. Go ahead. I just want to know what the basis is of the Oregon Auto denying liability and the U. S. F. & G.

Mr. Phillips: The U. S. F. & G.'s denial of liability, your Honor, is that the policy they had written on this defendant Suter did not cover him except as excess insurance when he was driving

another automobile, not the one covered by the [2*] United States Fidelity and Guaranty policy.

What occurred was, the United States Fidelity and Guaranty Company had written a \$5,000 policy on, I think it was, a Plymouth or a Pontiac, or some car, that was owned by Suter, the defendant. Then he went over to either the Houk Motor Company or the Redmond Motor Company, I don't know which, and they wanted to sell him a new Mercury car. He took this Mercury car to go from Redmond to Bend. On the way, either going or coming back, he had an accident that resulted in the judgment, while he was driving the automobile owned by the Motor Company.

The Court: But he owned the Plymouth car upon which the policy was issued by the U. S. F. & G.?

Mr. Phillips: That is correct, but he was not driving it. He was driving another automobile owned by the Houk Motor Company. I believe it was the Houk Motor Company.

The Court: You claim that you are the excess carrier?

Mr. Phillips: That is what I claim; yes, your Honor.

The Court: And the Oregon Auto says that they are not on the risk because of the garageman's liability policy; is that it?

Mr. Kester: No, your Honor. This is one of those cases of which came first, the hen or the egg.

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

The U. S. F. & G. policy says that when the assured is driving another car their policy is excess only. Our policy says that when someone other than [3] the named assured is driving one of the cars belonging to the named assured then our policy does not cover at all if the driver has other valid and collectible insurance. Now in this case the U. S. F. & G.'s assured was driving our car. He became an additional assured under our policy except for the fact of having the U. S. F. & G. policy, which, as we see it, is other valid and collectible insurance, and then it is excluded under our policy entirely. So I am inclined to agree with Mr. Phillips that the only issues here are purely legal questions as to the interpretation of the two policies.

The Court: Whom do you represent, Mr. Samuels?

Mr. Samuels: I represent the Morrises, who have the judgment and who have another case pending. We were sued because of the interest in the unpaid judgment over in Deschutes County.

The Court: You want to collect the judgment?

Mr. Samuels: I would like to.

The Court: It is the contention of Oregon Auto that, U. S. F. & G. having written the policy, it is not liable to any extent even as excess over the U. S. F. & G.?

Mr. Kester: I would qualify that to a certain extent, your Honor. It is our position that we are not liable at all as long as the U. S. F. & G. policy exists as other valid and collectible insurance. Now, Harry Samuels' client, Mrs. Morris, has a judg-

ment over in Deschutes County for seven thousand-odd dollars, which is more than the U. S. F. & G. limits, which are only \$5,000 [4] for one person. Now we concede that when the U. S. F. & G. has paid its \$5,000 on the Samuels' judgment then it ceases to be valid and collectible insurance as far as that judgment is concerned.

The Court: And they state the same thing as far as you are concerned?

Mr. Kester: They take the position that they are excess only. Our position is a little different, because, as we see it, our liability does not arise until their policy has been exhausted. Then we admit that we would have to pay the balance.

The Court: That ought to be a simple issue. I mean, it is only one issue. It might be a difficult legal problem. Let's take a five-minute recess and I will take a look at the proposed order.

(Short recess.)

The Court: Mr. Kester, do you want to make a statement now?

Mr. Kester: If your Honor please, we have agreed on a form of pre-trial order which sets up the legal questions arising on the construction of these two policies. There is a suggestion that there might be a factual issue in the nature of estoppel in the event the Court should hold that the Oregon Automobile Insurance policy applies to the accident. Pardon me. It is the other way around. In the event the Court should hold the Oregon Automobile policy does not apply to the accident then there

may be a question of estoppel, which, as I understand [5] it, it is contended by the other parties would change the legal effect of the policy as the Court might otherwise hold it to be. But we have agreed that the Court can segregate the issue and try first the question of the legal construction of the two policies on the basis of the language of the policies themselves, and if it becomes necessary to hold a further hearing on the question of estoppel then either party may ask leave to amend the pre-trial order to set forth more specifically its position on that factual matter.

We have here the two policies. I have the original of the Oregon Automobile policy which will be marked as Exhibit 2, and Mr. Phillips has a copy, I believe, of the U. S. F. & G. policy, which will be Exhibit No. 1.

The Court: Have those two exhibits marked.

(A specimen copy of Automobile Liability Policy of United States Fidelity and Guaranty Company was thereupon marked and received in evidence as Plaintiff's Exhibit 1; the original policy issued by Oregon Automobile Insurance Company to Houk Motor Company, Redmond Motor Company and Redmond Tractor Company was thereupon marked and received in evidence as Plaintiff's Exhibit 2.)

PLAINTIFF'S EXHIBIT No. 1

[Specimen copy of United States Fidelity and Guaranty Company Liability Policy. See page 15 of this printed transcript.]

STOCK COMPANY

COMBINED AUTOMOBILE POLICY

Policy No. 3325583

Oregon Automobile Insurance Company

(HEREIN CALLED THE COMPANY)

HOME OFFICE — PORTLAND 4, OREGON

IN CONSIDERATION OF THE WARRANTIES AND PREMIUMS HEREINAFTER MENTIONED

first to _____ and balance, if any, to Assured, as their respective interests may appear.

5. During the life of this policy the automobile described herein will be used only for business and pleasure—commercial. The term "business and pleasure" is defined as personal, pleasure, family and business use; the term "commercial" is defined as use principally in the business occupation of the named insured stated in Item 1, including occasional use for personal, pleasure, family and other business purposes. Use of the Automobile for the purposes stated includes the loading and unloading thereof.

6. During the life of this policy the automobile described herein will not be (a) used as a public or livery conveyance unless such use is specifically declared and described in this policy and a premium charged therefor; (b) towing or propelling trailers or other vehicles, excepting trailers used only for personal, pleasure or family purposes, while being used with an automobile of the private passenger type to which this policy applies, however this exclusion shall apply to Trailer Homes and Trailers used for business purposes other than a Trailer of the private passenger type owned by a farmer and used in connection with the operation of a farm; nor with respect to the automobile while used with any trailer not covered by like insurance in the company; nor with respect to any trailer covered by this policy while used with any automobile not covered by like insurance in the company; (c) in any work connected with a garage, repair shop, sales agency or service station, or public parking place; (d) rented to others, except

as herein stated **As per Endorsements attached**

7. The automobile described herein is principally garaged and used at or in the vicinity of the above address of the named assured unless herein stated.

No Exceptions

8. Have you ever been refused Insurance on any automobile, or have you ever had a policy of automobile Insurance cancelled, and if so give name of Company.

No Exceptions

This policy is made and accepted subject to the foregoing warranties and to the stipulation and conditions printed hereinafter, which are hereby specially referred to and made a part of this policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, nor shall any privilege or permission affecting the Insurance under this policy exist or be claimed by the Assured unless so written or attached and signed by an officer or other duly authorized representative of the Company.

Countersigned at **Bend**, Oregon, this **1st** day of **October**, 19**49**

COMBINED INSURANCE AGENCY

Authorized Representative

PERILS INSURED AGAINST

(Only as to items for which a premium is specified in the "Schedule of Insurance")

The company shall reimburse the insured for any one day not totalling more than \$150 or the actual cash value of the automobile at time of theft, whichever is the less, necessarily incurred for taxi or livery fares or for the rental of a substitute automobile following the theft covered hereunder of the described Automobile.

(C) **COMPREHENSIVE.** Any loss or damage to the insured automobile and the equipment usually attached thereto, including damage by fire, theft, explosion, riot, strike, civil commotion, sabotage, malicious mischief, vandalism, falling objects, missiles of falling objects, but excluding loss caused by accidental collision with another object or by upset, or by collision of the automobile with other vehicles, shall be covered whether or not such damage is caused directly or indirectly by, and resulting from, negligence on the part of the insured or others.

(D) COLLISION. Damage to Assured's automobile caused by accidental collision with another object or by upset, excluding loss or damage caused directly or indirectly by (1) fire, (2) theft, (3) water, whether caused by immersion therein or otherwise, and excluding loss or damage to power windows due to puncture, cut, slash, blow-out or other ordinary tire trouble, and excluding in any event loss or damage arising from liability claims against Assured.

CONVERTIBLE COLLISION OR UPSET. To pay for loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile upon the occurrence of the first loss for which payment is sought hereunder of that amount.

upset of the automobile, in excess of the aggregate amount of the Insured's retention stated in the Schedule of Insurance. For credit under the aggregate retention, the Insured must make immediate report to the Company of any loss and file with the Company a receipted bill for repairs within thirty days thereafter. When the Insured has expended the amount of the retention for repairs made necessary collision or upset and has

90% COLLISION OR UPSET ENCOURAGEMENT. To pay for loss of or damage to the automobile, hereinafter called loss, caused by collision on the automobile with another object or by upset, but only for 80% of the first \$250 of each such loss and for 100% of the amount in excess thereof, subject to conditions in Clause (B) Collision, appearing in body of the policy.

(E) **BODILY INJURY LIABILITY** relating to the bodily injuries of the Assured arising from the liability of the Assured to others resulting from the service of the Assured, which the Assured is legally responsible, or properly carried in or upon the automobile of the Assured and not exceeding as to any one accident, the limit set forth in the "Schedule of Insurance."

in the "Schedule of Insurances") on account of one person injured or claimed to have been injured, including death at any time resulting therefrom, shall be \$500.00, and, subject to the same limit for each person, the Company's total liability on account of any one accident so injuring or killing more than one person shall be \$10,000.00. These limits shall apply to each automobile insured hereunder.

paragraph DRIVE OTHER AUTOMOBILES, if the policy applies one of the use thereof and results from the use thereof of said automobile by the named insured or spouse or by a private chauffeur or domestic servant of either or (a) the occupancy of said automobile by the named insured or spouse, the reasonable expense of necessary medical surgery, ambulance, hospital and professional nursing services and

The limit of liability for medical payments stated in the Schedule of Insurance as applicable to "each person" is the limit of the Company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury, including death resulting therefrom, in any one accident. The inclusion herein of more than one insured shall not operate to increase the limits of the Company's liability for any one accident.

As soon as practicable after completion of the services or after the rendering of services which in cost equal or exceed the limit of liability for medical payments or after the expiration of one year from the date of the accident, whichever is the first, the injured person or someone on his behalf shall be notified in writing of the amount of the limit of liability for medical payments.

The Company shall have the right to make payment at any time to the Injured person or to any such person or organization on account of the payment received thereon.

Conditions Relating to Clause E and F of "Perils Insured Against"
ADDITIONAL COVERAGE. The Company will investigate all claims and accidents covered hereunder and defend in the name and on behalf of the insured.

[illegible]

insured's appearance in court if such appearance is required by reason of an accident or a traffic law violation occurring during the policy period and arising out of the use of an automobile with respect to which use insurance is afforded such insured under coverage (F) of this policy. The company's liability under this insuring agreement with respect to such bond shall not exceed the charges of Surety company.

to him (a) if it replaces an Automobile described in this policy, and if it may be classified for the purpose of use stated in this policy, but only to the extent the Insurance is applicable to the replaced Automobile; and (b) if it does not replace an Automobile described in this policy, and if it is used for pleasure purposes or in the business of the named insured as stated in the **Warranty**, and if the company insures all automobiles to him.

The provisions of this Paragraph do not apply (a) to any loss against which the named Insured has other valid and collectible insurance, or cash value thereof under those coverages (a) applying only to the automobile it replaces, or (b) if an additional automobile, applying in combination to all the insured's automobiles.

TEMPORARY USE OF SUBSTITUTE AUTOMOBILE. While an automobile owned in full or in part by the named insured is withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction, such insurance as is afforded by this policy for bodily injury to such other automobile.

ADDITIONAL ASSUREE.
The insurance granted by Clauses E and F shall in the same manner and under the same conditions, declarations and exclusions as to the Assured, apply to any person while legally operating any automobile described in the "Schedule of Warranties" with the following exceptions: (1) The Assured shall be deemed to have indicated the declared and actual use of the automobile in which the person is named as an additional assured.

of the automobile in "Lump
and Pleasure or Commercial", each as defined herein, and provided further
misfeasance of the named insured, provided that any Additional Insured who is covered by valid and collectible li-

liability of all valid and collectible insurance against such loss; provided, however, that the insurance under Paragraph "DRIVE, OTHER PRIVATE PASSENGER AUTOMOBILES" shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to the automobile or otherwise, against a loss covered under said paragraph, and further this Company will not be liable if any other person, firm or corporation indemnified hereunder is covered by valid and collectible insurance against a claim also covered by this policy, such other person, firm or corporation shall not be indemnified under this policy.

12. **THE COMPANY SHALL NOT BE LIABLE UNDER THIS POLICY** if: (a) The interest of the Assured in the property be other than an unconditional and sole ownership, or if the subject of this insurance be or become encumbered by any lien or mortgage, except as stated in Warranty No. 4 on page 1 of this policy, or otherwise endorsed herein; (b) If this policy or any part thereof shall be assigned without the consent of this Company endorsed hereon or in case of transfer or termination of any interest of the Assured other than by the death of an Assured, in which event if written notice be given to the Company within sixty (60) days after the date of such death the Company will cover any person having proper temporary custody of the automobile, as an assured, until the appointment and qualification as legal representative of the Assured, but in no event for a period of more than sixty (60) days after the date of such death; or by any change in the nature of the insurable interest of the Assured in the property described herein, either by sale or otherwise, except as hereinbefore stated.

13. **CO-OPERATION OF ASSURED.** The Assured shall aid in securing information, evidence, and in the attendance of witnesses, in effecting settlements, and in prosecuting appeals. The Assured shall at all times render to the Company all co-operation and assistance within his power, except in a pecuniary way.

14. **SUBROGATION.** In case of payment of loss and/or expense under this policy the Company shall be subrogated to all rights of the Assured to the extent of such payment, and the Assured shall execute all papers required and shall co-operate with the Company to secure to the Company its rights.

15. **CANCELLATION.** This policy shall be cancelled at any time at the request of the Assured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short-rate premium for the expired term. This policy may be cancelled at any time by this Company by giving to the Assured a five (5) days' notice of cancellation with or without tender of the excess of paid premium above the pro-rata premium for the expired term, which excess if not tendered shall be refunded on demand. Notice of cancellation shall state that said excess premium, if not tendered, will be refunded on demand. Notice of cancellation mailed to the address of the Assured stated in this policy shall be sufficient notice.

16. **MISREPRESENTATIONS AND FRAUD.** This entire policy shall be void if the Assured or his agent or any one for whom benefits are payable has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or in case of any fraud, attempted fraud, or false swearing by the Assured touching any matter relating to this insurance, whether before or after a loss.

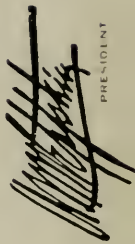
17. **INSPECTION.** The Company shall be permitted at all reasonable times during the policy period to inspect the automobile covered by this policy. The Company shall also have reasonable time and opportunity to examine any damaged automobile or its equipment covered hereby before repairs are undertaken or physical evidence of the damage removed, but the Assured shall not be prejudiced hereunder by any act on the Assured's part or in the Assured's behalf undertaken for the protection or salvage of the damaged automobile or its equipment.

18. **NO BENEFIT TO BAILEE.** Coverage under Clauses A, B, C and D of "Perils Insured Against" shall not inure directly or indirectly to the benefit of any carrier or bailee liable for loss of or damage to the automobile or automobiles insured hereunder.

THIS POLICY IS MADE AND ACCEPTED SUBJECT TO THE PROVISIONS, EXCLUSIONS, CONDITIONS AND WARRANTIES SET FORTH HEREIN OR ENDORSED HEREON, and upon acceptance of the Policy the Assured agrees that the terms embody all agreements then existing between himself and the Company or any of its agents relating to the insurance described herein. No notice to any agent, knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy nor stop the Company from asserting any right under the terms of this policy, and no officer, agent or other representative of this Company shall have power to waive any of the terms of this policy unless such waiver be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the Assured unless so written or attached. In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed an agent of the Company.

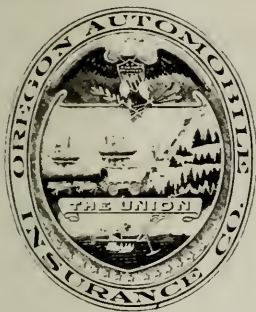
Provisions required by law to be stated in this Policy—This Policy is in a stock corporation.

IN WITNESS WHEREOF the OREGON AUTOMOBILE INSURANCE COMPANY has caused these presents to be signed by its President; but this policy shall not be valid unless countersigned by a duly authorized representative of the Company.



PRESIDENT

AN
OREGON COMPANY
FOR
OREGONIANS
AUTOMOBILE
INSURANCE



AN OREGON STOCK COMPANY

Writing the Following Classes
of Insurance:

COMPLETE COVERAGE ON
AUTOMOBILES
GENERAL CASUALTY LINES
and
FIRE INSURANCE
ON
SELECTED RISKS

Promptly notify our representative or
the Home Office of the Company
at Portland 4, Oregon, of any
Accident or Loss

Keep Oregon Money in Oregon

STOCK COMPANY
COMBINED
AUTOMOBILE POLICY

No. **332583**
HOUK MOTOR CO., REDMOND
MOTOR CO. & REDMOND TRACTOR
CO. ASSURED

Expires October 1st, 1950

Oregon
Automobile
Insurance
Company

of Portland, Oregon

ALL FORMS OF
INSURANCE

LUMBERMENS INSURANCE AGENCY

PHONE 17
118 120 OREGON AVE.
BEND, OREGON

PLEASE READ YOUR POLICY
Carefully Note Conditions Requiring
Immediate Notice of Accidents or Loss

Endorsement #3

Garage Liability

Additional Interests

(Blanket Basis)

It is agreed that such insurance as is afforded by the policy for Bodily Injury Liability and for Property Damage Liability applies subject to the following provisions:

1. To any employee of the named insured, as insured, provided:

(a) the insurance applies only to any such employee of the named insured, engaged in operations classified as "automobile dealer or repair shop," whose remuneration is included in the entire remuneration upon which premium for the policy is based; and

(b) the insurance afforded with respect to the ownership, maintenance or use of automobiles applies to any such employee while using, for such business operations or for pleasure purposes, any automobile covered under such classification.

2. To any other person or organization, as insured, provided:

the insurance applies only if the named insured's operations are classified as "automobile dealer or repair shop" and only with respect to the use, for such business operations or for pleasure purposes, of any automobile covered under such classification.

3. The insurance does not apply

(a) unless the actual use of the automobile is with the permission of the named insured;

(b) to any automobile owned by the insured, or by a member of his family, other than the named insured;

(c) with respect to injury to or death of any person who is a named insured;

(d) to any employee with respect to injury to or death of another employee of the same employer injured in the course of such employment.

In all other respects this policy will cover as per the printed conditions and stipulations embodied therein.

Attached to and forming part of Policy No. 332583 of the Oregon Automobile Insurance Company of Portland, Oregon, issued to Houk Motor Co., Redmond Motor Co., et al.

/s/ A. M. EPPSTEIN,
President.

Countersigned at Bend, Oregon, this 1 day of October, 1949.

LUMBERMENS INSURANCE
AGENCY,

By /s/ [Indistinguishable],
Agent.

Hoist Property Damage Endorsement

In consideration of an Additional Premium charged herein, it is understood and agreed that coverage under this policy is extended to include liability imposed upon the insured by law for damages because of injury to or destruction of property in the care, custody or control of the insured, including the loss of use, thereof, caused by accident and arising out of the ownership, maintenance, or use of hoists, at premises owned, rented or controlled in whole or in part by the insured; but excluding the hoist(s) and its (their) equipment themselves and property considered to be the premises or portions thereof.

Limit of Liability hereunder not to exceed \$1,000.00.

In all other respects this policy will cover as per the printed conditions and stipulations embodied therein.

Attached to and forming part of Policy No. 332583 of the Oregon Automobile Insurance Company, of Portland, Oregon, issued to Houk Motor Co., Redmond Motor Co. & Redmond Tractor Co.

/s/ A. M. EPPSTEIN,
President.

Countersigned at Bend, Oregon, this 1st day of October, 1949.

LUMBERMENS INSURANCE
AGENCY,

By /s/ [Indistinguishable],
Agent.

Cargo Insurance Endorsement—
Towing Endorsement No. 2

In consideration of One Hundred and No/100ths (\$100.00) Dollars (incl.) additional premium paid, and the payment of such further additional premiums as may become due under this contract, and the stipulations herein named, the Oregon Automobile Insurance Company does hereby insure Houk Motor Co., Redmond Motor Co., and Redmond Tractor Co. for an amount not exceeding Two Thousand and No/100ths (\$2,000.00) Dollars on vehicles while on, in and/or towed by the equipment described herein or while in the care or custody of the assured, provided the assured may be held legally liable therefor.

This insurance shall apply from the 1st day of October, 1949, to the 1st day of October, 1950, 12:01 a.m., unless cancelled by the Company or the assured.

The total loss or damage to property of any person or persons other than the assured arising from any one occurrence, shall be considered in the aggregate as constituting one claim and from the total amount so determined the sum of One Hundred and No/100ths (\$100.00) Dollars shall be deducted and this Company shall be liable only for loss or damage in excess of that amount, not exceeding the limits of liability named in the Policy.

Perils Insured Against—Against loss or damage directly caused by:

- (a) Fire, including self ignition and internal explosion of the conveyance, and lightning.

(b) Cyclone; tornado; and flood (meaning rising navigable water).

(c) Collision, upset and/or overturn of the vehicle while being towed or conveyed.

(d) Marine perils while on ferries.

Perils Not Insured Against

This policy does not insure:

1. Loss or damage caused by neglect of the assured to use all due diligence to save, preserve and protect the property in his or their custody at and after any disaster insured against.

2. Loss or damage to goods or property by rough handling or due to poor packing, nor for loss of liquids by leakage and/or breakage unless directly caused by perils insured against.

3. Loss or damage to goods or property by reason of inherent vice, delay, wet, dampness, discolored, rusted, frosted, rotted, soured, steamed or contact with other goods or property unless the same is the direct result of a peril insured against.

4. Liability of the assured except to the legal owners of goods or property in his or their custody.

5. Loss or damage to the conveying truck and equipment used in connection with the truck, tarpaulins, fittings or goods or property carried gratuitously or as an accommodation.

6. Live stock except against accident causing death or rendering death necessary in consequence of any of the perils insured against.

7. Loss occasioned by pilferage, or theft.

8. Against loss or damage to the property insured hereunder while located:

(a) In or on the premises of the Assured,

(b) In any garage or other building where the truck or trucks herein described are usually kept.

9. Against loss or damage occasioned by war, invasion, hostilities, rebellion, insurrection, confiscation by order of any government, public authority, or risk of contraband or illegal transportation or strikers, rioters, locked-out workmen or persons taking part in labor disturbances or civil commotions.

In all other respects this policy will cover as per the printed conditions and stipulations embodied therein.

Attached to and forming part of Policy No. 332583 of the Oregon Automobile Insurance Company of Portland, Oregon, issued to Houk Motor Co., Redmond Motor Co. & Redmond Tractor Co.

/s/ A. M. EPPKIN,
President.

Countersigned at Bend, Oregon, this 1st day of October, 1949.

LUMBERMEN'S INSURANCE
AGENCY,

By /s/ WARD H. COBLE,
Agent.

Endorsement No. 5

Hoist Collision Endorsement

It is hereby understood and agreed that this Policy is extended to cover any actual loss by reason of injury to or destruction of (a) any hoist for which premium has been charged hereunder, (b) any property of the Insured, and (c) the premises, or any part thereof, in which the hoist is located (provided the insured is the owner of such premises, or is liable for such damage or destruction) is caused solely and directly by a collision of such hoist or anything carried thereon with any other object, except (1) loss of use; (2) any loss due directly or indirectly to fire, (3) any loss due directly to the breaking, burning out or disruption thereof.

Limit of liability hereunder not to exceed \$1,000.00.

In all other respects this policy will cover as per the printed conditions and stipulations embodied therein.

Attached to and forming part of Policy No. 332583 of the Oregon Automobile Insurance Company, of Portland, Oregon, issued to Houk Motor Co., Redmond Motor Co. & Redmond Tractor Co.

/s/ A. M. EPPKIN,
President.

Countersigned at Bend, Oregon, this 1st day of October, 1949.

LUMBERMEN'S INSURANCE
AGENCY,

By /s/ WARD H. COBLE,
Agent.

OREGON AUTOMOBILE INSURANCE CO.

PUBLIC LIABILITY AND PROPERTY DAMAGE

OREGON UNIFORM ENDORSEMENT -- AUTOMATIC COVERAGE

The policy to which this endorsement is attached is an automobile bodily injury liability and property damage liability policy, and is hereby amended to comply by the named insured, as a motor carrier of passengers or property with appropriate provisions of the Motor Transportation Act of Oregon, as amended, and the pertinent rules and regulations of the Commissioner of Public Utilities of Oregon, promulgated in accordance with the provisions of the Motor Transportation Act of Oregon.

In consideration of the premium stated in the policy to which this endorsement is attached, or becomes a part, when duly countersigned, the company hereby agrees to pay any final judgment recovered against the named insured for bodily injury to or the death of any persons or loss of or damage to property of others resulting from injury to or death of the named insured's employees while engaged in the course of their employment, and loss of or damage to property owned or operated by the named insured, or in the care, custody or control of the named insured, and property transported by the named insured, designated as cargo, and to any obligation for which the named insured may be held liable under any Workmen's Compensation Law), resulting from the negligent operation, maintenance, ownership, or use of any motor vehicle under permit issued to the named insured by the Commissioner of Public Utilities of Oregon, or otherwise under the Oregon Motor Transportation Act, within the limits of liability hereinafter provided, regardless of whether such motor vehicles are specifically described in the policy or not. It is understood and agreed that upon failure of the company to pay any such final judgment recovered against the named insured, the judgment creditor may maintain an action in any court of competent jurisdiction against the company to compel such payment. The bankruptcy or insolvency of the named insured shall not relieve the company of its obligations hereunder. The liability of the company extends to such losses, damages, injuries, or deaths whether occurring on the route or in the territory authorized to be served by the named insured or elsewhere, within the State of Oregon, but as respects this endorsement only while operating under the provisions of the Motor Transportation Act of Oregon.

The liability of the company on each motor vehicle for the following limits shall be a continuing one notwithstanding any recovery hereunder, in the minimum amounts:

	BODILY INJURY Limit for Each Person	LIABILITY Limit for Each Accident	PROPERTY DAMAGE Limit for Each Accident
Each Motor Vehicle			
Each motor vehicle authorized for use in the transportation of property.....	\$5,000	\$10,000	\$5,000
Each motor vehicle authorized for use in the transportation of persons, having passenger seating capacities as follows:			
12 passengers or less	5,000	10,000	5,000
13 to 20 passengers	5,000	15,000	5,000
20 passengers or more	5,000	20,000	5,000

Nothing contained in the policy or any endorsements thereon, nor the violation of any of the provisions of the policy or of any endorsement thereon by the named insured, shall relieve the company from liability hereunder or from the payment of any such final judgment, but as respects any equipment of the named insured while being operated by others under an interchange of equipment agreement or requirement, the insurance afforded by this policy shall be excess over any other valid and collectible insurance available to the named insured.

In consideration of the attachment of this endorsement, it is agreed that any provision in the policy to which this endorsement is attached extending the limits of this insurance to any person, firm, or corporation other than the insured named therein is hereby declared null and void and in lieu thereof it is agreed that the unqualified words "named insured" wherever used in this endorsement include the named insured, his or its employees while acting within the scope of his employment and also any partner, executive officer, director or stockholder thereof while acting within the scope of his duties as such.

The named insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of any terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy, except for the agreed limits contained in this endorsement.

Cancellation of this endorsement or of the policy to which it is attached may be effected by the company or the named insured giving not less than 10 days notice in writing to the Commissioner of Public Utilities of Oregon at his office in Salem, Oregon, said notice to commence to run from the date notice is received at the office of said Commissioner.

Attached to and forming part of Policy No. 332583 Issued by the Oregon Automobile Insurance Company (Herein called company) of Portland, Oregon
Redmond Motor Co., Redmond Tractor Co., and Houk Motor Co. of Redmond, Oregon
Portland, Oregon, this 4th day of October, 1949

Countersigned by [Signature]
 Authorized Company Representative

The policy to which this endorsement is attached is a cargo policy, and is hereby amended to assure compliance by the insured, as a common carrier or a contract carrier of property by motor vehicle, with the Motor Transportation Code and amendments thereto, with reference to making compensation to shippers or consignees for all property belonging to shippers or consignees coming into the possession of such carrier in connection with its transportation service, and with the pertinent rules and regulations of the Public Utilities Commissioner.

In consideration of the premium stated in the policy to which this endorsement is attached, the Company hereby agrees to pay, within the limits of liability hereinafter provided, any shipper or consignee for all loss of or damage to all property belonging to such shipper or consignee, and coming into the possession of the insured in connection with its transportation service, for which loss or damage the insured may be held legally liable, regardless of whether the motor vehicles, terminals, warehouses, and other facilities used in connection with the transportation of the property hereby insured are specifically described in the policy or not. The liability of the Company extends to such losses or damages whether occurring on the route or in the territory authorized to be served by the insured or elsewhere.

Within the limits of liability hereinafter provided it is further understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, or any other endorsement thereon or violation thereof, or of this endorsement by the insured, shall affect in any way the right of any shipper, consignee, or consignee, or relieve the Company from liability for the payment of any claim for which the insured may be held liable to compensate shippers or consignees, irrespective of the financial responsibility or lack thereof or insolvency or bankruptcy of the insured. However, all insured conditions, and limitations in the policy to which this endorsement is attached are to remain in full force and effect as binding between the insured and the Company. The insured agrees to reimburse the Company for any payment made by the Company on account of any loss or damage involving a breach of the terms of the policy and for any payment that the Company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement.

The liability of the Company for the limits provided in this endorsement shall be a continuing one notwithstanding any recovery hereunder. The Company shall not be liable for an amount in excess of \$2,000, in respect of any loss of or damage to or aggregated losses or damages of or to the property hereby insured occurring at any one time and place, nor in any event for an amount in excess of \$1,000, in respect of the loss of or damage to such property carried on any one motor vehicle, whether or not such losses or damages occur while such property is on a motor vehicle or otherwise.

This policy, which includes the provisions of this form, shall not be cancelled or otherwise terminated at any time prior to its expiration until the insurer which issued same shall have filed a written notice of cancellation with the Public Utilities Commissioner of the State of Oregon, and thereafter said policy shall be cancelled upon the expiration of 30 days after the receipt of such notice, provided, however, that such cancellation shall not discharge the insurer from any liability which has accrued prior to the expiration of the policy, and that no such cancellation shall operate to void any of the conditions of these restrictions upon cancellation; and provided further, that any withdrawal or statement made by the insured to either or both the insurer and the Public Utilities Commissioner of the State of Oregon, either with respect to the issuance of this policy or any liability which may accrue under its provisions subsequent to the issuance thereof, or the filing by the Public Utilities Commissioner of any extension of time to the insured in which to comply with any of the provisions of the Motor Transportation Code of the State of Oregon, or any other forbearance on the part of either the Public Utilities Commissioner, or the insured to the Public Utilities Commissioner, shall not in any way release the insurer from its liability under this policy, notice to the insurer of any such alteration, extension or forbearance being hereby waived.

Attached to and forming part of policy No. 332583 Issued by the Oregon Automobile Insurance Co.
 (herein called Company) of Portland, Oregon to Redmond Motor Co., Redmond Tractor Co., &
Redmond, Oregon Houk Motor Co.
 of Redmond, Oregon

Dated at Portland, Oregon this 4th day of October, 19 49
 Countersigned by LUMBERMEN'S INSURANCE AGENCY
 Authorized Company Representative.

AUTOMOBILE DEALERS AND/OR AUTOMOBILE REPAIR SHOP AND/OR AUTOMOBILE STORAGE GARAGE AND/OR AUTOMOBILE SERVICE STATION ENDORSEMENT

This policy covers the total hazard of the assured named in the policy for public liability and property damage as defined and limited herein, and the premium is based upon an estimated annual payroll of \$..... as herein defined—rates per \$100.00 of payroll being:

Public Liability	(a) .106	(b) \$18,000.	(c) \$20,000.
Property Damage	(b) 1.29	(c) \$60,000.	
	(c) .412		
	(b) .56	(c) .18	

PUBLIC LIABILITY:

Injuries, including death any time resulting therefrom, accidentally sustained by any person or persons not employed by the assured, on or about the premises described in the policy and caused by the operations of the assured as described therein; this policy also covers injuries arising out of and in connection with the business of the assured, sustained by any person or persons not employed by the assured, elsewhere than on the premises of the assured and caused by or resulting from the operation or maintenance and use of any automobile covered under this policy.

PROPERTY DAMAGE:

Damage to or destruction of property of any kind, on or about the premises described in the policy and caused by the operations of the assured as described herein; this policy also covers damage to or destruction of property arising out of and in connection with the business of the assured elsewhere than on the premises of the assured and caused by or resulting from the operation or maintenance or use of any automobile covered under this policy; provided, however, that the company's liability is limited to the actual value of the property destroyed at the date of its destruction, or the actual cost of suitable repair of the property injured, and for damage resulting from loss of use of the property injured or destroyed, but in no event shall the total indemnity for both loss of use and damage to property be in excess of the property damage limits specified in this policy.

Provided, that this section does not cover the property of the assured, or property in the custody of the assured, or property which is rented or leased and for which the assured is legally responsible, either on or away from the premises of the assured, and not property carried in or upon any automobile of the assured, or upon any automobile in the custody of the assured, either on or away from the premises of the assured.

It is further provided that the Additional Assured Clause in the policy to which this endorsement is attached is hereby deleted.

OPERATIONS COVERED:—Described in Policy Warranty No. 1 as—

(1) **Automobile Dealers and Repair Shops**

All work necessary to the conduct of the named assured's business including the operation of all motor vehicles and trailers in such business and if automobiles owned by the named assured, for pleasure use.

(2) **Automobile Storage Garages and Service Stations**

All work necessary to the conduct of the named assured's business including the operation of motor vehicles and trailers in such business except the possession, consumption or use, elsewhere than upon the premises herein designated of any article manufactured, sold or distributed by the insured; and the operation of any motor vehicle or trailer which is

- (a) owned in whole or in part by the named assured or by the individual partners if the named assured is a partnership
- (b) hired or leased by the named assured
- (c) registered in the name of the named assured.

EXCLUSIONS:

This company shall not be liable under this policy for:

- (1) renting or hiring motor vehicles or trailers to others;
- (2) carrying of goods or materials for others except such transportation of goods or materials for prospective purchasers as is incidental to the sale of motor vehicles or trailers;
- (3) motor vehicles or trailers owned or hired by the assured and used as haulways for the conveyance of new motor vehicles, or for the wholesale or retail delivery of fuel oil or for the wholesale delivery of gasoline;
- (4) accidents arising from the ownership, maintenance or use for pleasure purposes of any automobile not owned by or in charge of the named insured for use principally in such operations;
- (5) accidents caused by aircraft or watercraft;
- (6) accidents caused by any escalator or elevator, its car or platform or by the shaft or hoistway within which it is operated or by any of the appliances used in the operation thereof;
- (7) accidents caused by any mechanical or hydraulic hoist used in raising or lowering automobiles or other material from one floor, balcony or platform to another;
- (8) accidents caused by structural alterations in making additions to, or the construction or demolition in whole or in part of any building, structure, elevator, mechanical or hydraulic hoist;
- (9) any liability of the insured to any employee of the insured while engaged in the business of the insured, or under any workmen's compensation law, plan or agreement;
- (10) injury to or destruction of property owned by, rented to, in charge of or transported by the insured;
- (11) any liability assumed by the insured under any contract or agreement;
- (12) any partner, if the named insured is a partnership, with respect to any automobile owned by such partner or by any other partner of the named insured or by a member of the family of any such person; or, if the named insured is an individual, to any automobile owned by a member of the named insured's family;

PAYROLL OF THE ASSURED:

The premium for this insurance is based (a) on the entire remuneration, including commissions, bonuses and other compensation earned during the policy period by all employees of the named insured engaged in the declared operations except that remuneration of salesmen and general managers is to be included on the basis of a fixed amount of \$2,000 per annum for each salesman and general manager and (b) on the remuneration earned during the policy period by the proprietor or proprietors, if the named insured is an individual or partnership, and by the president, any vice-president, secretary, treasurer and any other executive officer active in the defined operations, if the named insured is a corporation, on the basis of a fixed amount of \$2,000 per annum for each such proprietor or executive officer.

MINIMUM PREMIUM:

The assured shall, if requested by this Company or its authorized representative, render a sworn statement showing the total amount of all salaries and wages as indicated by their payroll for the term covered by this policy at any time subsequent to the expiration of same. It is also agreed that this Company or its authorized representative shall be permitted access to the books and/or payroll reports of the assured at any time within one year from date of expiration of this policy for the purpose of auditing the payroll of the assured during the term of this policy.

If such payroll report, submitted by assured or determined by an audit, shall be greater in amount than the estimated payroll upon which the premium paid for this policy was based, then the assured shall pay such additional premium as has been earned on the excess amount of such actual payroll. If such payroll is actually less than estimated payroll then this Company shall refund to assured the amount of unearned premium, except that

this Company reserves the right to retain a minimum premium of \$70.21..... as an earned premium under this policy regardless of amount of payroll expended or time this policy was in force.

INSPECTIONS:

The Company shall be permitted at all reasonable times to inspect the premises described herein and the automobiles covered by this policy.

Attached to and forming part of Policy No. 332583

OREGON AUTOMOBILE INSURANCE COMPANY.

Dated at Bend, Oregon, October 1st, 1949.

LOU KERRICK, Insurance Agency

Agent.

Mr. Phillips: As to those exhibits, your Honor, the paragraphs in the policies that we are interested in are in the United States Fidelity and Guaranty Policy Paragraph No. 5 and Paragraph No. 10, those two paragraphs. Paragraphs 5 and 10 in Exhibit 1.

Mr. Kester: In our policy, Paragraph 11 on the second page and at the top of the third page, the paragraph headed "Other Insurance." However, I would say this: That while I agree generally that the language of those clauses will be determinative, I would not want the Court to feel we were limiting his consideration to those clauses, because it is necessary to read those clauses against the background of the rest of the policy. I think it is necessary, in order to interpret those clauses, to do so in the light of the remainder of the policy. But I think the basic problem will arise under the clause in each policy headed "Other Insurance."

The Court: I am going to accept the pre-trial order and sign it, it having been approved by all the parties, with the understanding that we will take up first the legal liability, and in the event that a decision adverse to the plaintiff is rendered on the law we will then set the matter down for further hearing on the question of estoppel, with leave of plaintiff and defendant Oregon Automobile Insurance Company to apply for leave to amend the pre-trial order. Is that satisfactory?

Mr. Phillips: That is satisfactory. [7]

Mr. Kester: Yes.

(Thereupon the matter was argued to the Court by counsel, the Court took the matter under advisement, and thereafter, on March 28, 1951, the Court rendered its Oral Opinion, as follows:)

The Court: In the case of United States Fidelity and Guaranty Company, Plaintiff, vs. Oregon Automobile Insurance Company, et al., Defendants, Civil 5890, I find that the automobile liability policy issued by defendant to Oregon Auto Insurance Company is the primary insurance and creates liability up to its policy limits. The policy issued by the plaintiff is excess to that of the policy written by Defendant Oregon Auto.

Defendant Oregon Auto is therefore liable for the payment of the judgment recovered in the State Court by Beulah Morris against Defendant Raymond Suter, in the sum of \$7,360.00, plus costs and interest.

Defendant Oregon Auto under its policy is likewise required to defend the action filed in the State Court by Defendant William Morris for personal injury, property damage, and loss of consortium by reason of the injuries to his wife Beulah Morris.

As to the other issues in the case, I will receive any evidence that the parties desire to introduce and will hear argument on Monday, April 2, 1951, at 2:00 o'clock p.m.

(Thereupon proceedings in the above matter were adjourned until Monday, April 2, 1951, at 2:00 o'clock p.m.) [8]

April 2, 1951

Proceedings in the above matter were resumed, pursuant to adjournment, as follows:

Appearances:

W. K. PHILLIPS, and
ALBERT M. HODLER,
Of Attorneys for Plaintiff;

RANDALL B. KESTER, and
HOWARD K. BEEBE,
Of Attorneys for Defendants Oregon Auto-
mobile Insurance Company, Houk Mo-
tor Company, and Redmond Motor Com-
pany;

HARRY F. SAMUELS,
Of Attorneys for Defendants William
Morris and Beulah Morris.

The Court: Mr. Phillips, why are you entitled to any attorney's fee for defending this action?

Mr. Phillips: I think I am entitled to attorney's fees under the Oregon Statutes and under the equitable jurisdiction of this Court, both.

The Court: I am talking about reimbursement for the actions that you defended.

Mr. Phillips: The attorney's fee to Brewster and the attorney's fee to myself?

The Court: Yes.

Mr. Phillips: Those are incidental expenses that we expended for the use and benefit of the Oregon

Auto [9] because they refused to comply with their contract. We were acting as the agents of Suter.

The Court: Did you tender the defenses to Oregon Auto?

Mr. Phillips: Yes, your Honor.

The Court: Before you incurred any expenses?

Mr. Phillips: I don't recall whether it was before or not. As I understand it, the Oregon had already investigated the accident before my company knew anything about it. They had been corresponding back and forth, and when this case came up down at Salem—I don't recall. I have letters on the tender, though, your Honor.

The Court: Under your policy aren't you required to defend whether or not you are liable?

Mr. Phillips: We are required to defend, yes, your Honor, but we are not required to defend for the Oregon. Under their policy they are required to defend.

The Court: You were representing your own insured, weren't you? You were defending for your own insured? That was your obligation under the policy, even though you were not liable?

Mr. Phillips: That was my obligation under the policy, yes, to defend if the Oregon did not. Under the Oregon's policy they were required to defend. Due to the fact they wouldn't defend, they refused to defend, then of course it became my liability to defend. Their policy provides the same thing, that they are to defend, and it was their duty to defend in this lawsuit. Due to the fact

that [10] they did not or would not defend, then we had to.

The Court: I think you were the one that cited me a case to the effect that although the company was not liable for the payment they denied recovery for reimbursement for expenses in the defense of the case on the ground that even though they were not liable for the payment they were required under their policy to defend.

Mr. Phillips: Yes, but I don't think that case was similar to this, your Honor, where there was a tender. There was nothing stated in that case, as I recall, as to the fact of a tender. I have numerous letters here that I would like to put in evidence on the trial where the tender and the denial was made. There is no question, as I view it, about the reasonableness or the services being rendered. At least they are agreed to in the pre-trial order, that the services were rendered and that the services were reasonable. So I won't go into either one of those questions.

The Court: All right. Go ahead and put on your case.

Mr. Kester: May it please the Court, before the taking of evidence may I take up a matter in connection with the pre-trial order. I take it that perhaps I should do it before he puts on evidence. The Court will recall that at the time of our last hearing we had a preliminary informal discussion about how the matter would be presented, and it was agreed that we would argue the legal questions and that after the Court had considered those legal

questions [11] if there were further issues then the pre-trial order might be amended in order to fully present the case.

At the discussion of the legal questions the Court raised a question with respect to whether automobile liability insurance is in its nature personal to a particular person or whether it involves a particular car. That apparently entered somewhat into the consideration and discussion. That was, in fact, one of the questions argued. As I understand it, under the Federal Rules when an issue is presented to the Court to consider then the pre-trial order or the pleadings, whatever may be necessary, may be amended so as to include that issue.

I would like to present as a proposed amendment to the pre-trial order the following contention, which would be Contention No. 12 of the defendants Oregon Automobile Insurance Company, Houk Motor Company and Redmond Motor Company, and would appear at the bottom of Page 8 of the pre-trial order:

“The defendants Houk Motor Company, Redmond Motor Company, and Oregon Automobile Insurance Company contend that in the business of automobile liability insurance generally and as carried on by the defendant Oregon Automobile Insurance Company in particular, when separate policies exist covering the driver and the car, the insurance on the driver is considered primary and that on the car is considered secondary, and in computing rates for liability insurance such rates are

based on the risks [12] arising from the particular driver and have no relation to the particular kind of car being driven."

There would be a corresponding issue, your Honor, under the questions to be decided. Now that contention is, obviously, a mixed question of law and fact, and at the appropriate time here I would offer evidence in support of this contention.

Mr. Phillips: I object to that, if the Court please, to that amendment, on the ground and for the reason that that issue has already been determined on another ground. These policies have been construed. Now what he is trying to do is to reopen that determination that your Honor has already arrived at. I don't think that has any place in here at all, nor am I prepared to argue that, nor do I intend to argue those issues. He had the opportunity to bring that in fully and completely.

The Court: Your application is denied.

Mr. Kester: May I have an exception?

The Court: I have decided that question already. You may have an exception.

Mr. Kester: May I particularly point out that one of the reasons offered for the amendment is the fact that this question was presented to and considered by the Court, and under the rules, therefore, it is proper to incorporate it as an issue in the pre-trial order.

The Court: For the record I will state that in determining [13] the problem I did it on the basis of the adjudicated cases, and that was not an issue.

Mr. Kester: I will at the appropriate time ask

for leave to make an offer of proof in that regard.

The Court: All right.

Mr. Phillips: I don't know, your Honor, whether these letters have been given a proper numbering in the pre-trial order or not. I have a letter here dated September 5, 1950, or a copy of a letter, rather, written to Oregon Automobile Insurance Company by myself.

The Court: I don't even have the pre-trial order here. Are the copies of the pre-trial order identical with the original?

Mr. Phillips: I presume they are, your Honor.

The Court: I have a copy here, but I don't know if it is the same.

Mr. Kester: There has been no change in it, as far as I know, except that there was one exhibit added. No. 23 has been added.

Mr. Phillips: There is quite a number of those exhibits, your Honor, that are now unnecessary as far as the questions to be determined are concerned.

The Court: On the question of estoppel?

Mr. Phillips: That is correct.

The Court: No. 11, copy of letter dated September 5, 1950, [14] written by W. K. Phillips to Oregon Automobile.

Mr. Phillips: That is correct, your Honor. I would like to have it marked as No. 11.

Mr. Kester: Is this being offered in evidence now?

Mr. Phillips: Yes.

Mr. Kester: If the Court please, first may I ask

for what purpose that is being offered in evidence?

Mr. Phillips: On the question of the tender, your Honor, and the rejection by the Oregon.

Mr. Kester: As offered for that purpose, your Honor, we object to it on the ground and for the reason that Mr. Phillips, either individually or as attorney for the U. S. Fidelity and Guaranty Company, had no authority to make any tender on behalf of Raymond Suter, the person who was the defendant in the action brought in Deschutes County. I believe this one refers to the action in Marion County. Mr. Phillips had no authority to make any such tender, and this letter does not in fact constitute such a tender.

(Copy of letter dated September 5, 1950, W. K. Phillips to Oregon Automobile Insurance Company, was thereupon marked Plaintiff's Exhibit 11.)

PLAINTIFF'S EXHIBIT No. 11

September 5, 1950.

Oregon Automobile Insurance Company,
Equitable Building,
Portland, Oregon.

Re: Policy No. 332583

Morris vs. Redmond Motor Co.

Gentlemen:

As you have heretofore been advised on numerous occasions, the action under this policy, which

you are carrying on the Redmond Motor Company, instituted by Beulah Morris against Raymond Suter, et al., in Deschutes County, has been brought against Raymond Suter and James Stuchlik in Marion County, Oregon.

We are representing Mr. Suter due to your failure to do so by virtue of the fact that we have been employed by the U. S. Fidelity & Guaranty Co. We understand that your policy, hereinabove particularly numbered, covered Mr. Suter when the accident, over which this litigation arose, occurred.

The U. S. Fidelity & Guaranty Co. has kept you fully advised at all times of its contentions in this matter as to the coverage, and particularly that they consider their policy on Mr. Suter as excess coverage over and above the amount which you are carrying on Redmond Motor Company and Mr. Suter.

Of even date herewith we are filing in the Marion County action a general denial and plea in abatement, together with a motion for a change of venue from Marion County to Deschutes County, Oregon. We are doing this simply for the purpose of protecting Mr. Suter in order that no default will be taken against him. As a representative of the U. S. Fidelity & Guaranty Co. I do and do hereby tender to you the defense of this action in Marion County, namely, Beulah Morris vs. Raymond Suter and James Stuchlik, and demand that you forthwith and immediately take over the defense of this action for the benefit of Raymond Suter. In the event that you do not do so, then, of course, the

U. S. Fidelity & Guaranty Co., through us, will continue to defend Mr. Suter, and will look to you for payment of any and all judgments that may or might be taken against him by the plaintiff, Beulah Morris, and will further hold you responsible for all costs and attorneys' fees involved in this defense.

If we do not hear from you on or before the 15th day of September, 1950, advising that you accept the defense of this cause under your coverage, then we will take it for granted that you are refusing Mr. Suter coverage and will act accordingly.

Very truly yours,

PHILLIPS, HODLER &
SANDEBERG,

By

Attorney for U. S. F. & G. Co.

WKP:dr.

Mr. Phillips: Exhibit 12, your Honor, is a letter written by Mr. Kester to the United States Fidelity and Guaranty Company [15] in answer to the previous letter.

The Court: I am not going to rule on them now, Mr. Phillips.

Mr. Phillips: Oh, certainly not.

The Court: Go ahead.

Mr. Kester: An objection in so far as the same reasons would apply based on the letter to which this is an answer.

(Letter dated September 12, 1950, Randall B. Kester to U. S. Fidelity and Guaranty Company, was marked Plaintiff's Exhibit No. 12.)

PLAINTIFF'S EXHIBIT No. 12

Maguire, Shields, Morrison & Bailey
Attorneys at Law
723 Pittock Block
Portland 5, Oregon

September 12, 1950

U. S. Fidelity & Guaranty Co.
c/o Phillips, Hodler & Sandeberg,
1208 Public Service Bldg.,
Portland 4, Oregon.

Re: Morris v. Houk Motor Co. et al.,
(Deschutes County)

Morris vs. Suter and Stuchlick
(Marion County)

Gentlemen:

Your letter of September 5, 1950, addressed to Oregon Automobile Insurance Company, has been referred to this office for answer.

As we understand the situation, Beulah Morris brought an action in Deschutes County against Houk Motor Co., Raymond Suter and James Stuchlick arising out of the accident of October 15, 1949. In that action, Oregon Automobile Insurance Company is representing Houk Motor Co., through Cuning & Brewster, attorneys of Redmond. Mr.

Brewster also appeared in that action on behalf of Suter, who had already consulted him individually on matters arising out of this accident.

While the Deschutes County action was still pending, plaintiff brought another action in Marion County, arising out of the same accident, against Suter and Stuchlik only, not making the garage a defendant. Suter did not notify Oregon Auto of the bringing of that action, did not forward the summons and complaint to it, and did not request Oregon Auto to defend him in that action. Instead he apparently forwarded the suit papers to U.S.F.&G., and you have appeared for him on behalf of U.S.F.&G. While Oregon Auto had learned through other sources of the bringing of the Marion County action, your letter of September 5, 1950, was the first time anyone has requested it to appear on behalf of Suter in that action.

The policy of Oregon Automobile Insurance Company provides, among other things, that "any additional Insured who is covered by valid and collectible insurance against a claim also covered hereby shall have no right of recovery under this policy." The policy of Oregon Auto insures Houk Motor Company, and any rights Suter might have under that policy would be only as an additional insured. Since the U.S.F.&G. policy, in which Suter is the named insured, is other valid and collectible insurance applicable to this claim, it appears that Suter is not covered by the Oregon Auto policy with respect to this claim, and that his defense is the responsibility of U.S.F.&G. Co.

However, since you have requested Oregon Auto

to take over the defense of Suter in the Marion County action, we wish to advise you that Oregon Automobile Insurance Company is willing to take over that defense, upon the understanding that by doing so it does not admit any liability under its policy either to Suter or the U.S.F.&G. Co., and does not waive, surrender or in any way affect any of its rights or defenses under its policy, with respect to either Suter or the U.S.F.&G. Co. In other words, if Oregon Auto assumes this defense, whatever rights any of the parties may have with respect to either of the policies will be fully preserved, without prejudice, until after the conclusion of the litigation, at which time the effect of the respective policies can be determined. At that time, Oregon Automobile Insurance Company will expect to hold U.S.F.&G. responsible for all sums expended on behalf of Suter, whether by way of judgment, settlement, costs, expenses, attorneys fees, or otherwise.

If the foregoing non-waiver agreement is satisfactory you may forward the pleadings in the Marion County case to us.

Very truly yours,

MAGUIRE, SHIELDS,
MORRISON & BAILEY,

By /s/ RANDALL B. KESTER,
Attorneys for Oregon Auto.
Ins. Co.

RBK/mm

cc—Cunning & Brewster
Redmond, Oregon

cc—Ray Suter

Box 422, Redmond, Ore.

cc—U. S. Fidelity & Guaranty Co.

Cascade Building, Portland

cc—Oregon Automobile Ins. Co.

Equitable Building, Portland.

Mr. Phillips: No. 13, your Honor, is a copy of a letter. Have you any objection to copies?

Mr. Kester: No.

Mr. Phillips: Or would you rather provide the originals?

Mr. Kester: No, none whatever.

Mr. Phillips: Do you require any further identification?

Mr. Kester: No, I will admit the sending and receipt of the letter.

Mr. Phillips: Copy of letter of September 20, 1950, concerning the same thing.

(Copy of letter dated September 20, 1950, W. K. Phillips to Randall B. Kester, was marked Plaintiff's Exhibit 13.)

PLAINTIFF'S EXHIBIT No. 13

September 20, 1950.

Maguire, Shields, Morrison & Bailey,
Attorneys at Law,
723 Pittock Block,
Portland 5, Oregon.

Attention: Mr. Randall B. Kester.

Re: Morris v. Houk Motor Co. et al.
(Deschutes County)

Morris v. Suter and Stuchlik
(Marion County)

Dear Sir:

Your answer to my letter of September 5, 1950, has been read with interest. In so far as the Oregon Automobile Insurance Company accepting the defense of these actions under a non-waiver, the U. S. Fidelity & Guaranty Company advises you that it has no interest in that and again demands that Oregon Automobile Insurance Company assume all liability under its policy, in so far as Mr. Raymond Suter is concerned, and afford him a full and complete defense without limitations or qualifications. If you will review the file of the Oregon Automobile Insurance Company, you will find that it has been continuously advised in this matter. I do not have your policy but from general knowledge of policies of this kind. I would conclude that the phrase contained in your letter is inconsistent with the rest of the coverage, or at least ambiguous.

How this phrase could possibly affect the plaintiff's right of action against the Oregon or her privilege of garnishment under a judgment, borders on the inconceivable.

Further, I see no reason why that phrase should in any way affect the right of contribution.

The policy carried by Mr. Suter with the U. S. Fidelity & Guaranty Company in part reads:

“The insurance with respect to temporary substitute automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible insurance available to the Insured, either as an Insured under a policy applicable with respect to said automobiles or otherwise.”

If there is no primary coverage, then, of course, there is no excess insurance and Mr. Suter has no coverage under the U. S. Fidelity & Guaranty Company's policy issued to him.

U. S. Fidelity & Guaranty Company again demands that your client, Oregon Automobile Insurance Company, accept the defense and liability of the above named cases under its policy.

Very truly yours,

PHILLIPS, HODLER &
SANDEBERG,

By

WKP:dr.

Mr. Kester: We will object to that letter on the ground and for the reason that it is nothing but an argument, and [16] constitutes no evidence one way or the other as far as the case is concerned.

Mr. Phillips: It is part of the correspondence, your Honor, on the same matter.

Next is a letter dated November 7, 1950, written by myself to Maguire, Shields, Morrison & Bailey, Attention Mr. Randall Kester. That is Exhibit No. 14.

Mr. Kester: So far as that is offered as purporting to be a tender we will object to it. Also, on the ground that it is not such a tender; that neither the U. S. F. & G. nor Mr. Phillips had authority to make any such tender on behalf of Raymond Suter; and, furthermore, as to this and also the ones that were previously mentioned, any tender that they might constitute would come too late because at that time the cases were already pending and the U. S. F. & G. had already undertaken the defense, and that none of the original suit papers were ever submitted to the Oregon Automobile Insurance Company.

(Copy of letter dated November 7, 1950, W. K. Phillips to Maguire, Shields, Morrison & Bailey, was thereupon marked Plaintiff's Exhibit 14.)

PLAINTIFF'S EXHIBIT No. 14

November 7, 1950.

Maguire, Shields, Morrison & Bailey,
Attorneys at Law,
Pittock Block,
Portland, Oregon.

Attention: Mr. Randall Kester.

Re: Morris vs. Suter & Stuchlik.

Dear Sir:

As you have heretofore been advised, we represent the U. S. Fidelity & Guaranty Company, and are writing for them. As you know, we represented the defendant, Suter, in the case filed in Marion County. The defense of that case was tendered to you and you failed to accept the responsibility therefor. That case has now been abandoned and the one in Deschutes County has been revived and will be tried on the 20th day of November, 1950. I am at this time formally tendering you the defense of the case in Deschutes County, known as Morris vs. Suter, et al., Numbered, I believe, 7784. The U. S. Fidelity & Guaranty Company believes that you have coverage for Mr. Suter, one of the defendants, as well as the motor company, and insists that you accept the responsibility for the defense of that cause for him, and also the liability, if any, for any and all judgments that may or might be rendered against him. In the event that you do not do so, then, of course, the U. S. Fidelity & Guaranty Company will look

to you for payment of any and all judgments that may or might be taken against Mr. Suter by the plaintiff, Beulah Morris, and will further hold you responsible for all costs and attorneys fees involved in this defense.

Your immediate advices as to whether or not you will accept these responsibilities will be greatly appreciated.

Very truly yours,

PHILLIPS, HODLER &
SANDEBERG,

By

WKP:dr.

Mr. Phillips: No. 15, letter dated November 9, 1950, written by Mr. Kester to myself.

Mr. Kester: The same point that I made would apply to that.

(Letter dated November 9, 1950, Randall B. Kester [17] to W. K. Phillips, was marked Plaintiff's Exhibit 15.)

PLAINTIFF'S EXHIBIT No. 15

Maguire, Shields, Morrison & Bailey
Attorneys at Law
723 Pittock Block
Portland 5, Oregon

November 9, 1950.

Phillips, Hodler & Sandeberg
Attorneys at Law
Public Service Building
Portland, Oregon

Attention: Mr. Phillips
Re: Morris v. Suter et al.

Gentlemen:

This will acknowledge receipt of your letter of November 7, 1950. In tendering to us the defense of the action in Deschutes County, we presume that you intended to tender the defense to the Oregon Automobile Insurance Company, which we represent.

As we previously advised you, in connection with the action brought in Marion County, the policy of the Oregon Automobile Insurance Company provides, among other things, that "Any additional insured who is covered by valid and collectible insurance against a claim also covered hereby shall have no right of recovery under this policy." In another portion of the policy, the same result is indicated by the provision that "This company will not be liable if any other person, firm or corporation indemnified hereunder is covered by valid and

collectible insurance against a claim also covered by this policy, such other person, firm or corporation shall not be indemnified under this policy."

We understand that the United States Fidelity & Guaranty Co., which you represent, has a policy of liability insurance covering Mr. Suter, which is other valid and collectible insurance applicable to this claim. It therefore appears that Suter is not covered by the Oregon Automobile Insurance Company policy with respect to this claim, and that his defense is the responsibility of the U. S. F. & G. Co. We understand that U. S. F. & G. Co. has already assumed the defense of Mr. Suter, through attorney George Brewster, and Mr. Brewster also represents the Oregon Automobile Insurance Company in defending Houk Motor Company, its named insured.

The Oregon Automobile Insurance Company denies any and all liability under its policy with respect to Mr. Suter, and respectfully declines your tender of the defense of Mr. Suter.

Very truly yours,

MAGUIRE, SHIELDS,
MORRISON & BAILEY,

By /s/ RANDALL B. KESTER,
Attorneys for Oregon Automobile Insurance Com-
pany.

RBK/mm

cc—Ray Suter

Box 422, Redmond, Oregon

cc—U. S. Fidelity & Guaranty Co.

Cascade Building, City

cc—Oregon Automobile Ins. Co.

Equitable Building, City

cc—Cunning & Brewster

Attorneys at Law, Redmond, Ore.

Mr. Phillips: Have you got that letter from Suter to you?

Mr. Kester: Yes.

The Court: You are offering No. 16 now?

Mr. Phillips: No. 16, yes, your Honor. That is the original.

The Court: What is the objection to this one, Mr. Kester?

Mr. Kester: No objection, except that it is not a tender. It doesn't purport to be.

The Court: You object to the introduction?

Mr. Kester: First, for what purpose is it offered?

Mr. Phillips: To show that the Oregon was given the opportunity and that demands were continuously made on the Oregon to defend these cases, and that the defenses were tendered to them a half a dozen different ways after they had knowledge of the lawsuits.

Mr. Kester: As far as its being offered as proof of a tender, we will object to it on the ground that it does not on its face purport to be a tender, and it does not include with it nor has there ever been

submitted to Oregon Auto the original suit papers in any of these lawsuits.

Mr. Phillips: I don't think that is necessary, your Honor, after their denial——

The Court: All right.

(Letter dated November 16, 1950, Ray E. Suter to [18] Oregon Automobile Insurance Company, was marked Plaintiff's Exhibit 16.)

PLAINTIFF'S EXHIBIT No. 16

Redmond, Oregon
November 16, 1950.

Oregon Automobile Insurance Company
Equitable Building
Portland, Oregon

Gentlemen:

Re: Ray E. Suter and/or Lela Suter—
Loss: 10/15/49

I hereby request acknowledgment from you in reference to claim filed against me on the above captioned accident.

It is my understanding that the Oregon Automobile Insurance Company would be known as the primary insurance carrier, therefore owing to me a defense in litigation arising out of this accident.

Very truly yours,

/s/ RAY E. SUTER.

Mr. Phillips: Copy of letter from Mr. Kester to Ray Suter. That is No. 17.

The Court: The same objection?

Mr. Kester: The same thing.

(Copy of letter dated November 17, 1950, Randall B. Kester to Ray Suter, was marked Plaintiff's Exhibit 17.)

PLAINTIFF'S EXHIBIT No. 17

Maguire, Shields, Morrison & Bailey
Attorneys at Law
723 Pittock Block
Portland 5, Oregon

November 17, 1950.

Mr. Ray Suter
Redmond
Oregon

Re: Morris v. Suter et al

Dear Sir:

Your letter of November 16, 1950 addressed to the Oregon Automobile Insurance Company has been referred to this office for answer. You have already been sent copies of our letter to the U. S. Fidelity & Guaranty Co. dated September 12, 1950, and also our letter of November 9, 1950 to Phillips, Hodler & Sandeberg, attorneys for the U. S. Fidelity & Guaranty Co. The position of the Oregon Automobile Insurance Company is fully stated in those letters and we reaffirm that position at this time.

As we understand it, the U. S. Fidelity & Guaranty Co. had a policy of liability insurance covering you at the time of this accident, and that company has undertaken your defense in the present case through George Brewster. The policy of insurance which the Oregon Automobile Insurance Company had with respect to the Houk Motor Company does not apply to you in this situation and the Oregon Automobile Insurance Company has not and does not assume any responsibility with respect to your defense in the present case, or any judgment that may be recovered against you.

Very truly yours,

MAGUIRE, SHIELDS,
MORRISON & BAILEY,

By RANDALL B. KESTER,
Attorneys for Oregon Automobile Insurance Com-
pany.

RBK:jmw

cc—W. A. Phillips

cc—U. S. Fidelity & Guaranty Co.

cc—Oregon Automobile Ins. Co.

cc—Cunning & Brewster

The Court: Are you offering 18 now?

Mr. Phillips: I will offer No. 18, your Honor.

The Court: All right. Any objection?

Mr. Kester: Same objection, your Honor.

(Copy of letter dated December 19, 1950, Joseph A. Boyce, Superintendent of Claims, to Oregon Automobile Insurance Company, was marked Plaintiff's Exhibit 18.)

PLAINTIFF'S EXHIBIT No. 18

Carbon Copy From
United States Fidelity and Guaranty Company
W. Talbot Sinclair, Manager
Portland 4, Oregon

December 19, 1950

~~Oregon Automobile Insurance Company~~
~~Equitable Building~~
~~Portland, Oregon~~

Gentlemen :

Re: 54-AL-2640—Ray E. Suter, Assured—
Accident 10-15-49

This letter is addressed to you for the express purpose of tendering to you the defense of the litigation, wherein Mr. Morris has instituted an action in Deschutes County against Raymond Suter, Houk Motor Company and James Stuchlik, defendants, arising out of the same automobile accident occurring on October 15, 1949, subject of prior correspondence, copies of which have been forwarded to your office.

Therefore, consider this letter a formal tender of the defense of this suit from this company to your company, such tender referring specifically to ap-

pearing or answering on behalf of defendant, Raymond E. Suter.

Yours very truly,

/s/ JOS. A. BOYCE,
Supt. of Claims.

JAB:hj

~~cc: Ray E. Suter, Redmond, Oregon~~
cc: Phillips, Hodler and Sandeberg—
Portland, Ore.

The Court: No. 19 would be the answer from Mr. Kester?

Mr. Phillips: Yes.

(Copy of letter dated January 9, 1951, Randall B. Kester to U. S. Fidelity and Guaranty Company, was marked Plaintiff's Exhibit 19.)

PLAINTIFF'S EXHIBIT No. 19

January 9, 1951

U. S. Fidelity & Guaranty Co.
1112 Cascade Building
Portland 4, Oregon

Re: Your No. 54-AL-2640

William Morris v. Suter, Redmond
Motor Company and Stuchlik.

Gentlemen:

Your letter of December 19, 1950 tendering to the Oregon Automobile Insurance Company the

defense of defendant Raymond Suter has been referred to this office for answer.

You have been previously advised, in connection with the case of Beulah Morris, arising out of the same accident, that the policy of the Oregon Automobile Insurance Company provides, among other things that "any additional insured who is covered by valid and collectible insurance against a claim also covered hereby shall have no right of recovery under this policy." The policy also provides "this company will not be liable if any other person, firm or corporation indemnified hereunder is covered by valid and collectible insurance against a claim also covered by this policy, such other person, firm or corporation shall not be indemnified under this policy."

We understand that the U. S. F. & G. has a policy of liability insurance covering Mr. Suter, and in Mr. Phillips' letter of December 4, 1950 to Mr. Brewster, a copy of which was sent to us, he states that yours is a \$5,000 policy. We assume from that statement that your policy has limits of \$5,000 with respect to injury to any one person, \$10,000 with respect to injuries arising out of any one accident, and \$5,000 with respect to property damage arising out of any one accident. We have been advised that the case of Beulah Morris against Suter and others, which was tried in Deschutes County in November, 1950, resulted in a judgment in the amount of \$7,360.00 in favor of the plaintiff and against the defendant Suter.

To the extent that your policy is exhausted by

payments on the judgment of Beulah Morris, that policy would no longer be valid and collectible insurance of defendant Suter, and to that extent our exclusion would not be applicable. We understand that the present case, by William Morris, includes a claim for \$1500.00 for personal injuries to William Morris, \$250.00 for property damage for William Morris, and \$7500.00 for loss of consortium arising out of the injury to Beulah Morris.

With respect to the first cause of action, for Mr. Morris' own personal injuries, and the second cause of action for his property damage, it would seem that your policy is applicable, and since the demand is within the limits of your policy, we can see no way in which either of those claims could come within the policy of Oregon Automobile Insurance Company. With respect to the claim for loss of consortium, it seems to us that this would be damage arising out of the injury to Mrs. Morris, and if and when you have exhausted your \$5,000 limits for claims arising out of the injury to Mrs. Morris, then our exclusion would not apply, and we would be willing to defend Mr. Suter on that cause of action.

We are not advised as to whether you have made any payment on the Beulah Morris judgment, and until we know that we can take no position with respect to the cause of action for loss of consortium. As to the first and second causes of action, we respectively decline your tender of the defense. When you have exhausted your policy with respect to the injuries of Mrs. Morris, then we will be

pleased to cooperate with you in defending Mr. Suter, but only as concerns the cause of action for loss of consortium.

Very truly yours,

MAGUIRE, SHIELDS,
MORRISON & BAILEY,

By RANDALL B. KESTER.

cc—Phillips, Hodler & Sandeberg, Public Service
Bldg., City.

cc—Oregon Auto, City

cc—Cunning & Brewster, Redmond, Ore.

The Court: Are you offering 20?

Mr. Phillips: Yes, your Honor. That is on the Salem deal. [19]

Mr. Kester: May I ask for what purpose this letter is being offered?

Mr. Phillips: There will probably be some evidence on that, Randall. Maybe we can agree that you called me up and told me that Mr. Brewster wanted us to appear down there. Do you remember that?

Mr. Kester: I wouldn't agree with that summary of our conversation. However——

Mr. Phillips: What was the conversation?

Mr. Kester: We will put on the evidence, if necessary. We will object to that letter from Mr. Brewster to Mr. Phillips on the ground and for the reason it is purely hearsay, not binding on the Defendant Oregon Automobile Insurance Company

at all; that any statements purported to be made by Mr. Brewster are not in any way binding on the Oregon Automobile Insurance Company. I think that is sufficient.

The Court: All right. I will note your objection.

(Letter dated September 11, 1950, George H. Brewster to Wendell K. Phillips, was marked Plaintiff's Exhibit 20.)

PLAINTIFF'S EXHIBIT No. 20

Cunning & Brewster
Attorneys at Law
Redmond, Oregon

September 11, 1950

Mr. Wendell K. Phillips
1208 Public Service Building
Portland 4, Oregon

Re: Morris v. Suter

Dear Sir:

I just received your letter of September 8. I have been advised unofficially by Oregon Automobile Insurance Company that they are going to take over the defense of the above action. I have requested that they give you an immediate answer. If I am to try to get the case changed over here for trial, I want to be in on all of the preliminaries in getting it put over here. I believe we can have the place of trial fixed for Deschutes County.

I will write a letter to the Oregon Automobile

Insurance Company and enclose a copy of it in this letter.

Very truly yours,

/s/ GEO. H. BREWSTER.

GHB:r

enc

Mr. Phillips: A letter from Cunning & Brewster to Oregon Automobile Insurance Company, November 28, 1950. I apparently missed that one.

The Court: Is that No. 23?

Mr. Phillips: This is concerning the attorney's fees, your [20] Honor. I don't think that is material under the pre-trial order.

The Court: How about the letter from Brewster to you dated September 14th? Are you offering that one, Exhibit 21?

Mr. Phillips: No, your Honor.

The Court: All right. What about Exhibit 22?

Mr. Phillips: No, that is on the estoppel.

The Court: What about 23?

Mr. Phillips: That is on the estoppel.

Mr. Kester: We have 23 here, your Honor. We will offer that one.

The Court: Any objection, Mr. Phillips?

Mr. Phillips: No.

(Copy of letter dated July 8, 1950, George H. Brewster to United States Fidelity & Guaranty Company, was marked Defendants' Exhibit 23.)

DEFENDANTS' EXHIBIT No. 23

Law Offices of
Cunning & Brewster
Redmond, Oregon

July 8, 1950

United States Fidelity & Guaranty Company
Cascade Building
Portland, Oregon

Gentlemen:

I have received a copy of a letter you have written to Mr. and Mrs. Suter in regard to Ray Suter's automobile policy 54-AL-2640. In regard to the contents of your letter, I am unable to advise you what attitude the Oregon Automobile Insurance Company will take. I am defending the action, representing Ray Suter and also the Oregon Automobile Insurance Company. As far as Houk Motor Company is concerned I am certain they will get an order of involuntary non-suit against plaintiff.

As far as taking over the defense is concerned, I understand Oregon Automobile Insurance Company will take over the defense as far as Houk Motor Company is concerned, but I was employed by the General Adjustment Bureau to defend Suter and also am employed by the Oregon Automobile Insurance Company to defend Houk. We have to put in separate defenses due to the nature of the case.

In any event, I do not anticipate too much trouble in the defense of this case.

Very truly yours,

/s/ GEO. H. BREWSTER.

GHB:jf

cc—Mr. Ray Suter

Redmond, Oregon

—Oregon Automobile Insurance Company

Equitable Building

Portland, Oregon

Mr. Kester: I might say that is offered largely in rebuttal of any inference that may be drawn from other letters of Mr. Brewster.

Mr. Phillips: Your Honor, I might just as well put in these others. I would like to ask for an amendment of the pre-trial order adding 24 and 25, if those letters are going in. One of them is a letter from myself to George Brewster, and the other one is a letter from Maguire, Shields & Morrison to George [21] Brewster.

Mr. Kester: As far as the letter dated December 4th, 1950, from Phillips to Brewster is concerned, we would object to it as being purely self-serving. It is not in any way binding on us. It merely relates to the manner in which the U. S. F. & G. is going to pay its own attorney, and it is in no way binding on this defendant. It is purely hearsay as far as we are concerned.

Now, the letter which I wrote to Brewster, dated

December 5th, is largely concerned with the same matter, and I don't really think that it is material to this case. However, if those are going in—they have not previously been referred to, and therefore there was nothing in the pre-trial order about them—I would ask Counsel if he would agree that the United States Fidelity and Guaranty Company did, in fact, pay Brewster attorney's fees for representing Suter in all of these actions.

Mr. Phillips: You don't have to ask me that, your Honor. That is in the pre-trial order.

The Court: It is admitted, isn't it?

Mr. Kester: If it is covered, all right. Otherwise it would be by Counsel's present statement.

The Court: That is part of the amount that plaintiff is trying to recover from Oregon Auto?

Mr. Phillips: That is correct, and that is in the pre-trial order.

(Copy of letter dated December 5, 1950, Randall [22] B. Kester to Cuning & Brewster, was marked Plaintiff's Exhibit 24; copy of letter dated December 4, 1950, W. K. Phillips to Cuning & Brewster, was marked Plaintiff's Exhibit 25.)

PLAINTIFF'S EXHIBIT No. 24

Maguire, Shields, Morrison & Bailey
Attorneys at Law
723 Pittock Block
Portland 5, Oregon

December 5, 1950

Cunning & Brewster
Attorneys at Law
Redmond, Oregon

Re: Morris v. Suter et al

Attention: Mr. Brewster

Dear Sir:

The Oregon Automobile Insurance Company has referred to us for answer your letter of November 28, 1950 with respect to the fees and expenses in connection with the above case. As you know, it is the position of the Oregon Automobile Insurance Company that you were retained by it to represent the defendant Houk Motor Company, and that the Oregon Auto was not obliged to and did not defend Suter, but that your defense of Suter was on behalf of the United States Fidelity & Guaranty Company.

It would be our suggestion that all fees and expenses up to the time of trial, including the taking of depositions, obtaining medical examinations, and preparation for trial be divided equally as between the defense of Houk Motor Company and the defense of Suter. The Oregon Automobile Insurance Co. will pay that one-half representing the defense

of Houk Motor Company. It is our belief that the other one-half, representing the pre-trial expenses for the defense of Suter, should be paid by the U. S. F. & G., and that all of the trial expenses, including the fee of Bruce Spaulding, should be paid by U. S. F. & G. We understand that the Oregon Auto has already paid certain expenses for medical examinations for which it would be entitled to credit against its share of the expense.

In connection with the cost bill, to which we understand you have filed objections, a copy of a purported subpoena was delivered to Oregon Automobile Insurance Company, together with the sum of \$28.00 witness fees. The subpoena was void for the reason that it required attendance at a place farther than 100 miles, and was not accompanied with any order of the Court. The witness fees were not used, and have been returned to Mr. Samuels.

Very truly yours,

MAGUIRE, SHIELDS,
MORRISON & BAILEY,

By RANDALL B. KESTER.

RBK/mm

cc—Oregon Automobile Ins. Co., City

cc—United States Guaranty & Fidelity Co.—City

cc—Philips, Hodler & Sandberg, Attorneys at Law
—City

PLAINTIFF'S EXHIBIT No. 25

December 4, 1950

Cunning & Brewster,
Attorneys at Law,
Redmond, Oregon.

Attention: Mr. George H. Brewster.

Re: Morris vs. Suter.

Dear Sir:

This is to advise that I am in receipt of a copy of your letter of November 28, 1950.

I am requesting U. S. Fidelity & Guaranty Company, the company I represent, to either pay one-half of your charges or pay whatever you arbitrarily determine they owe. As far as the U. S. Fidelity & Guaranty is concerned we attempted to settle this case and would have done so if the Oregon Automobile Insurance Company would have paid one half of the said settlement. The Oregon Automobile Insurance Company refused to cooperate and arbitrarily advised us that they would not pay any greater sum than \$1,500.00. As I understand it now, the plaintiff has no interest in our \$5,000.00 policy, but expects to collect his judgment from the Oregon Automobile Insurance Company. If the Oregon Automobile Insurance Company sees fit to bring us in, then, of course we expect to collect from them any and all amounts that we have paid out up to the present time.

Kindly let me know what amount you expect from us and I assure you that it will be paid.

Copy of this letter goes to Mr. Kester, who has been representing the Oregon Automobile Insurance Company in this matter.

Very truly yours,

PHILLIPS, HODLER &
SANDEBERG,

By

WKP/dp

cc: Randall B. Kester.

cc: U. S. Fidelity & Guaranty.

The Court: Does that complete your case?

Mr. Phillips: Yes, so far as that particular phase of it is concerned.

The Court: In so far as attorney's fees are concerned?

Mr. Phillips: And those incidental expenses.

The Court: All right.

Mr. Kester: While we are offering exhibits—I don't know if this is the proper time for it, but I would like to have marked and offered the Oregon Automobile Insurance Company Daily for its policy, which under this numbering would be 26, I believe. We have put the policy in, and I would like to have the Daily.

Mr. Phillips: I didn't put my Daily in.

Mr. Kester: It is referred to here. I would like to have the Daily go in, anyway.

The Court: Any objection to the Daily?

Mr. Phillips: No objection, your Honor.

The Court: It may be admitted.

(The document referred to, entitled "Automobile Daily Report, Oregon Automobile Insurance Company," was received in evidence and [23] marked Defendants' Exhibit 26.)

The Court: Mr. Kester, do you want to put in anything as to plaintiff's right to recover attorney's fees from Oregon Auto? That is, attorney's fees expended in connection with the defense of the cases?

Mr. Kester: I don't think it needs any evidence, your Honor. I think it is largely a question of law. As far as the expenses of defending the cases are concerned, it will be our position, first, that regardless of whether Oregon Auto might be liable under its policy the U. S. F. & G. was concurrently liable, at least for the defense of its own named assured, and that therefore it was obligated to carry on the defense regardless of where the ultimate liability might fall. We would also suggest to the Court from the exhibits that are already in, which the Court has not had a chance yet to consider, it will appear that there was not any demand made on the Oregon Auto at all until after the U. S. F. & G. had already undertaken the defense of those cases.

The Court: All right. I will look and see if there was a proper tender. I have some doubt, Mr. Phillips, as to whether you are entitled to recover, regardless of whether there was a proper tender.

I think you will agree that if the defenses were not tendered to Oregon Auto plaintiff would not be entitled to recover.

Mr. Phillips: I don't think that is true; not in an equity [24] court. They are not required to make any tender at all under the circumstances, where they were defending one defendant, and they knew all about it. In a court of equity those could be expenditures made for their use and benefit.

The Court: All right.

Mr. Phillips: We could turn around and sue them for money had and received on the same proposition.

The Court: Now we will go to the next point. Are you entitled to attorney's fees as against the Oregon Auto for services rendered in connection with this case?

Mr. Phillips: I think so.

The Court: Give me some citations. Have you got any cases?

Mr. Phillips: Under the statute, your Honor. The Oregon statute is right square on it.

The Court: What does it say?

Mr. Phillips: Section 101-134:

“Whenever any suit or action is brought in any court of this State upon any policy of insurance or any kind or nature whatsoever, including the policy or certificate issued by fraternal benefit societies as defined in Section 101-701, the plaintiff, in addition to the amount

which he may recover, shall also be allowed and shall recover, as part of said judgment, such sum as the Court or jury may adjudge to be reasonable as attorney's fees in the said suit or action; [25] provided that settlement is not made within six months from the date proof of loss is filed with the company or society; provided, further, that if a tender be made by a defendant in any suit or action and the plaintiff's recovery shall not exceed the amount thereof, then no sum shall be recoverable as attorney fees. If attorney fees are allowed as herein provided and on appeal to the Supreme Court by the defendant the judgment is affirmed, the Supreme Court shall allow to the respondent such additional sum as the Court shall adjudge reasonable as attorney fees of the respondent on such appeal. The terms of this act shall not apply to any suit or action started or begun prior to the passage of this act."

It says any lawsuit under any kind of an insurance policy in any court.

The Court: You mean for the purpose of getting the defendant to assume liability in a case they would be liable for attorney's fees to the U. S. F. & G.?

Mr. Phillips: I think so, your Honor.

The Court: I think that is referring to Mr. Samuels' client.

Mr. Phillips: Here is the situation, your Honor. We are in an equity case. The Federal Court in equity has jurisdiction to allow attorney's fees. In this particular case it was necessary for us to bring this lawsuit to determine who was liable. It was necessary to do that to make that determination. We [26] brought this matter into court, this \$7300 judgment, and also the fact that they are required to defend this other case for \$9200. That was necessary and for the benefit of everybody. There is no question, I don't believe, in anybody's mind but what an insurance company acts as an agent for their assured. We had to do that. We had to protect him. Also, we had to have the liability determined in equity. Now this is an action on an insurance policy. The recovery has been allowed.

The Court: Do you think that Mr. Samuels is entitled to an attorney's fee?

Mr. Phillips: I most certainly do.

The Court: Do you think that you are also entitled to an attorney's fee?

Mr. Phillips: I do.

The Court: Have you any cases on it?

Mr. Phillips: I have a United States Supreme Court case on general authority. Is there any question in your mind but what you have authority to grant attorney's fees in cases of this kind, in equity cases?

The Court: I think the fact that the case was brought in equity alone does not make any difference, but are you the type of person that the law

attempts to cover? That is what I am talking about.

Mr. Phillips: The general equity jurisdiction of the Federal Court, your Honor, as I understand it, permits your Honor to [27] grant an attorney's fee.

The Court: Even in the absence of statute?

Mr. Phillips: In the absence of any statute, your Honor. That is an authority that you have.

The Court: You make two contentions: First, that under the statute you are entitled to it and, secondly, that even in the absence of statute——

Mr. Phillips: Even in the absence of any statute your Honor has authority to grant an attorney's fee. This case is *Lloyd F. Sprague, Petitioner, vs. Ticonic National Bank, and others*, 307 U. S. 160, 83 Law Ed. 1184. That lays down the principle, I believe, that the Federal Court, a court of equity, has broad enough and sufficient jurisdiction in an equity case to allow an attorney's fee.

The Court: Even in the absence of statute?

Mr. Phillips: In the absence of any statute. You don't need any statute at all.

The Court: Let's hear what Mr. Kester has to say.

Mr. Kester: If the Court please, in the first place, talking about the statute, I think the statute by its terms does not cover the U. S. F. & G. in this case. In the first place, it says whenever any suit or action is brought in any court of this State.

The Court: I think, Mr. Kester, that that has

been construed to permit the recovery of attorney's fees in this court. [28]

Mr. Kester: Very well; the Court may by comity follow the statute, but the statute by its own terms does not expressly permit it because it is just talking about State Courts, although the Court might choose to follow the statute here.

However, going further, it says, "upon any policy of insurance." Now this was not an action brought on a policy of insurance. This was an action for a declaratory judgment to have the Court interpret two policies of insurance, both theirs and ours. Now, when they talk about an action on a policy of insurance, the statute is obviously talking about someone seeking to recover in his own behalf money required to be paid under the policy.

The Court: Mr. Kester, isn't that satisfied by the affirmative complaints of Mr. Samuels' clients?

Mr. Kester: As far as Mr. Samuels is concerned he is in a much different position than Mr. Phillips on this point. Now I don't seriously deny that Mr. Samuels would be entitled to attorney's fees, although there are some factors of that I would like to discuss in a moment. But certainly if the Morrisses can be considered as having counter-claimed on the policy and therefore brought an action on the policy, the U. S. F. & G. did not sue on the policy because they don't stand in the position of the Morrisises on this situation. In fact, their contention is expressly that they do not stand in the position of the Morrisises. [29]

The Court: I know that. They are an adverse party, too.

Mr. Kester: Certainly. They are asking for an interpretation of the contract, just like any other contract. Now, as far as this being in equity is concerned, of course declaratory judgments are *sui generis*. They are under particular statutes. Declaratory judgments are not any more equitable than they are legal. They are a kind of proceeding all their own. And the Court in a declaratory judgment suit, I think, is limited to relief of a declaratory nature, and such relief as may be ancillary to the declaration of rights. But it does not gain anything to come in here and say we are in equity, because we are not. We are under a particular statute. It is a statutory type of procedure.

The Court: Do you think there is any prohibition against my allowing the plaintiff restitution for the amounts that he has expended for the defense of this action?

Mr. Kester: Any prohibition?

The Court: Yes. Do you think I am prevented by lack of power to require the Oregon Auto to pay the amounts expended by the U. S. F. & G. in the defense of the case in Salem?

Mr. Kester: As far as the question of power is concerned, of course, I guess the Court can order us to do anything that is within the scope of the issues. However, I think as a matter of construction of the policies we should not be required to pay them, because under their own policy they

are [30] obligated to defend their assured, regardless of who may ultimately have the liability.

The Court: I have indicated that I am fairly sympathetic with your point of view, but I don't know whether I am right. This question may arise even though I hold against the Defendant Oregon Auto—even though I hold with Defendant Oregon Auto on the question of restitution then we have the question of whether the U. S. F. & G. is entitled to recover by reason of this action brought. Do you have any cases which indicate in a proceeding of this kind the plaintiff company is not entitled to attorney's fees?

Mr. Kester: In this particular proceedings? That is, for bringing this proceeding?

The Court: Yes.

Mr. Kester: I have no cases, your Honor. I would rely on the general principle that, generally speaking, attorney's fees cannot be allowed in the absence of some statute authorizing it. But there is no statute suggested here to authorize it. Counsel says that they did it for our benefit, and that they could sue us for money had and received—no, I am confused with the other one. Counsel suggested that it was necessary for them to bring this declaratory judgment action. That I deny. Now, it may have been convenient for him, convenient for all of us, perhaps, to have this determined in the declaratory judgment action rather than in a garnishment proceeding on [31] the policy. The Morrisises could have garnished the U. S. F. & G. policy and could have garnished our

policy, and these questions could have been threshed out there. Or he could have sued either one or both directly. But it was not necessary in the sense of the U. S. F. & G. preserving its rights to bring this particular action. That was merely a convenience for them.

Mr. Beebe reminds me—and I think it is a good point, your Honor—supposing that Mr. Suter had pursued the remedies I have just suggested. Suppose that he had garnished the policy of the U. S. F. & G., and the U. S. F. & G. had been required in that proceeding to pay Suter, and the U. S. F. & G. then had turned around and sued us and raised the same issue that they have attempted to raise in this proceeding. That proceeding would only then have been for money had and received, for money paid for the use and benefit, for our use and benefit by satisfying the judgment. Suppose they had gone ahead and done that. That still would not have been an action on the policy. That would have been a common law action of assumpsit. Of course, that goes both to the original defense, in a way, and also this proceeding.

The Court: The liability of Oregon Auto would certainly have been predicated on the policy. I don't see how they could have sued——

Mr. Kester: It would not be a liability to the U. S. F. & G. It would have been a liability to Suter, perhaps, if any at all, [32] but not to the U. S. F. & G. The U. S. F. & G. is not under any circumstances either a named assured or an additional assured under our policy. We owe no duty

whatsoever to the U. S. F. & G., except as it might arise if they had paid something for our benefit. Then there might be an equitable suit for a contribution or for indemnity or for money had and received, but they would not be suing on the policy. They would be suing under their common law or equitable right of reimbursement.

The Court: If they were suing on a right of subrogation——

Mr. Kester: Of course, they are not subrogated in this type of situation. Even so, that would not have been on the policy, because they are not either a named assured or an additional assured. If they paid something they were not required to pay, and did it to our benefit, they might have an equitable proceeding in subrogation or indemnity, or a contribution, or an action for money had and received, but it still would not be an action on the policy within the meaning of this.

The Court: All right. Mr. Phillips, what have you got to say?

Mr. Phillips: If the Court please, I don't understand Counsel's theory that a declaratory judgment action is not in the nature of an equitable suit. Now, your Honor asked for authorities. I might suggest to your Honor that there is a case in this court where Judge Mathes in Los Angeles in a [33] declaratory judgment suit allowed a \$25,000 attorney fee that I was on the wrong end of, I remember that distinctly, in a declaratory judgment suit. And so far as bringing the action is concerned, Counsel says, "Why, sure, he could have

garnished us both.” He could have brought probably a half dozen different kinds of lawsuits against both of us, and we could, too. That is just the reason for bringing this one suit by this plaintiff, to block and stop all of that litigation and have it all determined, all the contentions, in one suit. That is for the benefit of them as much as anybody else. We certainly are a third-party beneficiary under that contract, and we have been benefited. We brought this fund of theirs into this court, and we are entitled to recover.

Now I was surprised at Counsel. When the Oregon sued the General Casualty Company of America for a contribution, the Oregon Automobile Insurance Company, through Mr. Kester, had this to say concerning that statute:

“With respect to attorney’s fees, while this is not a suit on an insurance policy in the ordinary sense, it is a suit based on the policy in the sense that the plaintiff’s right of contribution depended upon the obligation of defendant to the insured. That obligation is evidenced by the defendant’s policy. The statute, Section 101-134, O.C.L.A., says, ‘any suit or action,’ and it is not limited to a suit by a beneficiary or the [34] named assured. The amount of such fees we leave to the discretion of the Court. Respectfully submitted, Randall B. Kester.”

Now that is the best authority I have.
The Court: What did the Court do?

Mr. Phillips: He hasn't done it yet.

Mr. Kester: No less an authority than Mr. Oppenheimer said I was wrong when I said that.

Mr. Phillips: I don't think there is any question about that interpretation of the statute. We are not only relying on that statute, but we are entitled, as I see it, to recover a reasonable attorney's fee for the bringing of this suit for the benefit of all parties under the equity jurisdiction of this Court.

The Court: How much do you think Mr. Samuels is entitled to?

Mr. Phillips: How much do I think he is entitled to? I am not going to set his fee. That is your province; not mine.

The Court: Do you think you should contribute or participate in the fee of Mr. Samuels?

Mr. Phillips: No, your Honor, I don't. Probably the fact that I do not contribute to Mr. Samuels would warp my views to some extent on what he is worth.

The Court: We ought to hear from Mr. Samuels. How much work have you done? [35]

Mr. Samuels: I think, your Honor, the file itself shows——

The Court: Do you want him to take the stand?

Mr. Kester: I don't insist on it, your Honor.

Mr. Phillips: Not me.

The Court: All right.

Mr. Samuels: I have a little formula which I have worked out, which may or may not be approved by the Court. It seems to me that \$1100 would be a reasonable fee in this matter.

The Court: \$1100? How do you arrive at that?

Mr. Samuels: I arrived at that for this reason: That this matter, as most personal injury cases I have handled, was handled upon a contingent basis.

The Court: I am not going to allow a fee on that basis.

Mr. Samuels: I wanted to give you the reason for it, your Honor. As far as I am concerned, this is the same as an appeal. I wrote to my lady when this matter first came up and told her I would have to charge the same as on an appeal, which is the difference between 40 per cent and 50 per cent. I don't know why she should have to pay the difference on it. That would come, roughly, to \$750. We have two cases here, and I think that the work I have done here would justify that, together with about three hundred or three hundred fifty dollars for defending Mr. Morris' interests. He has a case with nine thousand dollars plus involved, and he is also sued here, and this applies to his case which is pending. I am referring to the value of [36] the services as well as the actual physical work done.

The Court: That is what I would like to have you tell us. Do you keep a time record?

Mr. Samuels: No, I don't. I know what I did, however.

The Court: What was it?

Mr. Samuels: When this matter first came in I had issued an execution against Mr. Suter. When the papers came into the office I immediately had

them copied, which was quite a task. I prepared and mailed to Mr. and Mrs. Morris authority for me to appear and represent them. We subsequently had a telephone conversation where it was agreed I would go right ahead and make an appearance for them without having them served by the Marshal.

The mechanics, then, were to prepare the pleadings. I worked with Mr. Phillips in this case, had at least four or five physical contacts at his office—we had coffee together at one time—and I went through my file and furnished him with the documents I had on this estoppel matter. I think he prepared a pre-trial order, or a proposed order, which I went over together with him, and we made some amendments to that one. It was necessary to check the entire law on this, for the reason that it was not until I think the answer of the Oregon Auto was filed, a matter of a very few days before the pre-trial conference and the trial, because at that time I was under the assumption they would deny any coverage as they had [37] before, except for the \$5,000, and I felt it my duty to go into the applicable law here which was cited during the course of the trial, and which I had checked to determine the rights of our people here.

The Court: You made an independent investigation of the law?

Mr. Samuels: That is right, your Honor.

The Court: Let me see your trial memorandum.

Mr. Samuels: I have no trial memorandum

except the notations of cases. When I say I did it, the man from our office did it. I am referring to Mr. Crookham, who was paid by us to do that. They are probably in here. Here is one here.

The Court: If Mr. Crookham did the work, let him testify as to what work he did.

Mr. Samuels: May I call Mr. Crookham?

The Court: Yes.

CHARLES S. CROOKHAM

was thereupon produced as a witness in behalf of Defendants Morris and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Samuels:

Q. By whom are you employed, Mr. Crookham?

A. I am employed by yourself and Mr. Vergeer, Vergeer & Samuels. [38]

Q. What does your work consist of?

A. Primarily legal research for the office.

Q. Did you at my request and before the time that this case came on for trial go to the Law Library and prepare a rather exhaustive research of cases pertaining to the various subject matters which have come up?

A. I did.

Q. May I ask you as to whether when you found cases that you thought were negative as to the issues if you prepared briefs on those cases?

A. No, I didn't. I merely discarded them from my own notes.

(Testimony of Charles S. Crookham.)

Q. About how much time do you think you expended in legal research before the trial?

A. Before the trial in Bend?

Q. Before the trial here before the Court, on this matter that is before the Court at this time. I think you were present at the time of the trial, were you not?

A. Yes. I roughly estimate—I didn't keep a timecard myself—I spent about two or two and a half full working days.

Q. That was doing nothing except research work?

A. Yes.

Q. Did you prepare, as the Court has requested me to furnish him, any detailed trial brief of the law?

A. No, I didn't in this case.

Q. What is our usual practice in the office as to that where [39] we are representing the plaintiff in the case?

A. Usually we attempt to keep it down to a minimum. When something very detailed is required I dictate it to the girls, the actual authorities that we want to use, separating the good from the bad, and just reducing it to a fair minimum.

Q. Were you present in the courtroom of Judge Solomon at the time this matter was heard?

A. Yes, I was.

Q. The cases that were cited in the trial of this case by both the plaintiff and the Defendant Oregon Automobile and the other defendants represented by Mr. Kester, had you perused and found almost all of those cases that were cited?

(Testimony of Charles S. Crookham.)

A. I would not say almost all. Mostly the line of cases I seemed to be following were Mr. Phillips' cases, and I was not, frankly, very familiar with many of the cases Mr. Kester cited.

Q. You had found all of those cited by Mr. Phillips, had you? A. Approximately, yes.

Q. Had those been read by you and studied?

A. Yes.

Q. And before the answer was filed by Mr. Kester had we gone into the matter as to whether Oregon Automobile Insurance Company would be required to pay in the event that the U. S. F. & G. was found to be the only applicable insurance in this case? A. Yes.

Q. Will you tell us which of these memoranda were prepared by [40] you, if any of them?

A. All of these were, these four or five cases that you have here with just very cursory briefs, were ones that I made. You made some notes this afternoon from what I read you out of an Oregon case on the measure of damages or the measure of recovery. The rest of these notes were made in my own handwriting.

Q. As I recall, Mr. Crookham, there was another sheet of notes some place. I can't find them now. Am I correct in that?

A. Yes. These don't represent the entire notes.

Mr. Samuels: No further questions.

(Testimony of Charles S. Crookham.)

Cross-Examination

By Mr. Kester:

Q. Are you admitted to practice law, Mr. Crookham? A. I am not, Mr. Kester.

Q. You are now attending the Northwestern College of Law? A. Yes, sir.

Q. As a matter of fact, you studied the law of insurance under me last semester, didn't you?

A. Yes, sir.

Q. You didn't find the cases that I cited to the Court here?

A. No, I didn't, Mr. Kester.

Q. That won't be held against you as far as your grades are concerned. Do you have any idea about how much time you spent on this?

A. I think from my own work it was about two and a half working [41] days.

The Court: What do you call working days, how many hours?

A. Oh, your Honor, I think I would average probably six and a half actual hours of study or research on a problem.

The Court: In a day? A. Yes, sir.

Q. (By Mr. Kester): How long have you been employed by Mr. Samuels?

A. Since September of 1949.

Q. Have you been working full time in his office?

A. Yes, I have, with the exception of a tour of duty with the Army.

(Testimony of Charles S. Crookham.)

Q. How long since you came back?

A. I have been with him since September, with the exception of two months in the intervening period of time.

Q. Do you do investigation work as well as legal research? A. Yes, a certain amount.

Q. Do you know about how much of your time is spent on legal research?

A. About 95 per cent.

Mr. Kester: I have no further questions.

Mr. Phillips: No questions.

Redirect Examination

By Mr. Samuels:

Q. May I ask one question: Are you about ready to take the Bar? [42] A. Yes.

Q. That will be this coming time?

A. I trust I will be able to then.

Mr. Samuels: Thank you. No further questions.

(Witness excused.)

Mr. Samuels: Does the Court wish anything further on this? I might point out that the time here would be a matter of two and a half days that Mr. Crookham worked on it, and a day in attendance here. I am talking about the time of the trial. There were either one or two appearances on call. I am not sure whether we had one or two. And there was the necessary office work. There was probably a total of six and a half actual working days on this.

The Court: Including Mr. Crookham's time?

Mr. Samuels: Yes, sir.

The Court: I will think that over.

Mr. Samuels: It would be more than that, probably; probably another day besides that, including the time we spent with Mr. Phillips' office.

The Court: Mr. Phillips, are you sending Mr. Samuels a bill, too?

Mr. Phillips: No, your Honor.

Mr. Kester: Does your Honor wish to hear from me on this?

The Court: Yes. [43]

Mr. Kester: As I indicated to the Court, we do not seriously oppose the allowance of some attorney's fee to Mr. Samuels, but under the peculiar circumstances of this case, while I would not ordinarily take issue with the reasonableness of an attorney's fee which is seriously claimed, I think I should make some observations on this particular kind of a case.

In the first place, it has been rather obvious, I think, that Mr. Samuels in this case has been more or less working hand in hand with Mr. Phillips. I don't say that in any spirit of criticism, because of course he is entitled to, but I think that should be taken into consideration in evaluating his position in the case. It seems to me that it is entirely conceivable that the Morrisises were not necessary parties to this proceeding except in a purely formal manner. No one, so far as I know, has ever seriously questioned but what the Morrisises were entitled to have their judgment paid by one or the

other of the insurance companies, and it is just a question purely between the companies. The only purpose, so far as I know, of having the Morrises in the case is just so that whatever judgment is entered is binding on them and that they are not in an adverse position at all. However, they really had nothing to lose whatsoever by this case. So that the appearances here have not been in any sense necessary.

Of course, the plaintiff, for the plaintiff's own convenience, made them parties so that the judgment would be [44] binding on them. We didn't make them parties. It is not through any of our doing that they were named as defendants here or that Mr. Samuels felt he should appear for them. I think that if the case had gone by default as against the Morrises it would not have made the slightest difference in the case of the Morrises because they would be sure to be paid by one or the other of the companies in some proportion.

We have always taken the position that when the U. S. F. & G. had satisfied their obligation, what we conceived was their primary obligation, we would pay the balance, if any. That was expressed in our correspondence and it was expressed in the answer that was filed here.

The statute which I imagine they rely on, the Oregon statute, provides that in the event of a tender and they don't recover more than the tender there shall be no fees at all. In this case the judgment that the Court has indicated so far would imply a judgment against the Oregon Auto for

more than the tender, but I think it can be taken into consideration in evaluating the necessity for these services that we have at all times been willing to pay the difference if the U. S. F. & G. paid its five thousand. No one has ever denied that they were entitled to be paid by one company or the other.

I don't think that it is a case where they should be regarded in the same light as in another type of case.

Mr. Phillips: Just a moment. If the Court please, I don't [45] agree with Mr. Kester's statement at all. As a matter of fact, he denied liability, so far as I know, entirely on his policy and said it didn't cover. And I think that his correspondence and these exhibits show that position, and that that was his position up to the time we were going into pre-trial here, until he wrote me that second letter. His position was up to that time that they didn't owe anything.

Mr. Samuels: May I say the same thing occurred between Mr. Kester and myself. He denied any coverage at all, and it was necessary for us to be in here for that reason, and to help prepare the law for that reason.

The Court: When did he deny coverage?

Mr. Samuels: It seems to me it was before the case was filed.

Mr. Kester: The correspondence, I think, is perfectly clear.

Mr. Phillips: You didn't write to Mr. Samuels?

Mr. Kester: No.

Mr. Samuels: I might advise the Court that I

called Mr. Kester about getting out an execution, and he told me there was no coverage as far as his company was concerned.

Mr. Kester: If this is going to depend on our respective testimony as to what that conversation was——

The Court: I will rule on that in the next couple of days.

Mr. Kester: If other matters have been completed, may I make an offer of proof, your [46] Honor?

The Court: Yes.

JOHN C. DORAN

was thereupon produced as a witness in behalf of Defendant Oregon Automobile Insurance Company and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Mr. Doran, are you employed by Oregon Automobile Insurance Company?

A. Yes, I am.

Q. What are your duties?

A. Well, my duties are as comptroller, including automobile underwriting.

Q. Would you speak up just a little louder.

A. They include automobile underwriting, too.

Q. What is your title with the company?

A. Comptroller.

(Testimony of John C. Doran.)

Q. How long have you been with the Oregon Automobile Insurance Company?

A. Fourteen months.

Q. How long have you been in the insurance business or connected with it?

A. Twenty-three years. [47]

Q. During that twenty-three years what has generally been the nature of your experience? What line of the insurance industry were you in?

A. General insurance.

The Court: Are you an underwriter? Did you work for underwriters? You were in the underwriting end, weren't you?

A. I have been, yes, and am at present.

The Court: Is there any doubt of his qualifications?

Mr. Phillips: I don't know what he is going to qualify on.

The Court: On how they determine rates.

Mr. Phillips: I don't care about that.

Q. (By Mr. Kester): Are you familiar with the manner in which automobile liability insurance rates are computed? A. Yes.

Q. Is that a part of your duty at the present time? A. That is correct.

Q. Have you been familiar with the computation of liability rates over a period of years?

A. That is correct.

Q. Will you tell us how classifications for liability rates are established? Who establishes them and how are they established?

(Testimony of John C. Doran.)

A. They are established by statistical bureaus from the accumulation of experience figures from various companies, insurance companies. [48]

Q. Is there a central organization that puts out manuals of that sort? A. Yes, there is.

Q. What is that organization?

A. The National Bureau of Casualty Underwriters.

Q. Does that Bureau have a manual of rate classification? A. It has.

Q. Is that for all types of liability insurance?

A. Yes, they have.

Q. Does that cover automobile liability insurance? A. Including automobile liability.

Q. Now, does the Oregon Automobile Insurance Company follow generally the classifications set up in the National Bureau Manual?

A. Generally, yes.

Q. As of the present time, as these are handled at the present time, what factors, generally speaking, enter into the computation of an automobile liability rate? A. The premium?

Q. Yes.

A. The territory or location, the individual, his age, occupation, perhaps, or the use made of the automobile.

Q. Is there account taken of the particular kind of automobile he is driving?

A. No, that has no bearing. [49]

Q. Has there been any time in the underwriting business when the kind of automobile was an im-

(Testimony of John C. Doran.)

portant factor in the computation of a liability premium? A. Years ago, yes.

Q. Up until about what time was that true?

A. About March of 1940 there was a complete change.

Q. Prior to March of 1940 did the Manual of the National Bureau include classification based on the kind of automobile driven?

Mr. Phillips: If the Court please, I think the Manual would be the best evidence instead of what this man says it is. He is going quite far, I think.

Mr. Kester: I think, your Honor, that the testimony is competent as summarizing the results of a very complex and voluminous bunch of documents.

The Court: Objection overruled.

Mr. Phillips: I object to it as calling for a conclusion.

Q. (By Mr. Kester): Based on your knowledge of the method of computing liability rates prior to 1940 would you state whether the kind of car had something to do with it then?

A. It did at that time.

Q. In what way?

A. Each make of automobile was assigned a symbol, a letter symbol. They were grouped. As I recall, there were three groups. I don't recall the details.

Q. Generally speaking, what type of automobiles carried higher [50] rates?

A. Well, the larger, more expensive ones, generally.

(Testimony of John C. Doran.)

Q. Now, since 1940 has that factor been important in writing liability insurance at all?

A. Of no importance.

Q. Are there any other factors in the computation of an automobile liability premium other than the risk of the particular driver, or are they all related to the particular driver?

A. Well, the other drivers of the vehicle might enter into it.

Q. For example, in the particular case here I will ask you to refer to Exhibit 26, which is the Daily for this particular policy. I will ask you to state how the premium for this policy was computed.

A. This premium was computed on the basis of payroll.

Q. This is what is known as a garage liability policy?

A. Correct.

Q. Would you explain how pay roll enters into the computation of the premium?

A. Well, you have three classifications of employees: Your clerical or office employees, which take one rate, and then your salesmen, managers, and so forth, who actually sell and demonstrate vehicles, who take another rate; and then there are the inactive partners or executives, and the mechanics, and so forth, who come into that third class.

Q. Now, the basic garage liability features of the policy do [51] not cover anyone other than employees of the garage itself, do they?

(Testimony of John C. Doran.)

A. I don't know that I quite understand your question.

Q. The basic garage liability endorsement only covers the garage itself and its employes; it doesn't cover additional interests, does it?

A. Not the basic policy, no.

Q. When an additional-interest clause is added, such as in this policy, covering people driving the garage's cars, how is the premium for the additional interest computed?

A. A percentage of the basic premium.

Q. And the basic premium is still on a payroll basis?

A. That is correct.

Q. But in that type of policy is any consideration given to the kind of vehicle?

A. It does not enter into the premium at all.

Q. Is there even any consideration of the number of vehicles involved?

A. No, that has no bearing at all.

Mr. Kester: I think that is all.

The Court: The offer of proof is rejected.

Mr. Phillips: No questions.

(Witness excused.) [52]

The Court: Have you got another witness?

Mr. Kester: No, your Honor.

The Court: As I view it, the matters that are now submitted to me for determination are whether or not the United States Fidelity and Guaranty Company is entitled to reimbursement for money expended in defense of the two lawsuits, as to

whether or not the U. S. F. & G. is entitled to attorneys' fees for the bringing of this suit for a declaratory judgment, and the amount of attorney's fees to be allowed to the Defendants Morris, if any.

Mr. Samuels: If there is any question as to our being allowed an attorney's fee here, I would like to offer some more evidence.

The Court: I think that Mr. Kester has not seriously contended that.

Mr. Kester: I don't seriously question the right to them. I do suggest that the amount of them should be viewed with regard to their position in the lawsuit.

The Court: I know your position.

Mr. Samuels: Your Honor, if that is going to be taken into consideration I would like to offer some evidence on that.

The Court: What type of evidence do you want to offer?

Mr. Samuels: For one thing, as to whether we should be here or not. For another thing, I want to have the record show that I called Mr. Kester before this case was filed and he disclaimed any coverage in this policy as far as we were [53] concerned, which left us with \$5,000 available from the U. S. F. & G. That is why we are in here, or one of the reasons we are in here.

The Court: Prior to the time of the pre-trial order you knew that the Oregon Auto was not seriously contending that you would not be entitled to that or that they were denying all liability.

Mr. Samuels: About two days before. I think

we were served on a Friday, if I am correct, or Thursday, and the trial was set for Monday.

The Court: From your examination of the law wasn't it quite simple for you to determine that either the U. S. F. & G. would be liable or the Oregon Automobile Insurance Company would be liable; that both of them could not get out?

Mr. Samuels: That was my interpretation of it, your Honor.

The Court: It seems to me, Mr. Samuels, that every case Mr. Phillips cited indicated that.

Mr. Samuels: That is right.

The Court: And it didn't take very much research to determine that point.

Mr. Samuels: That is correct.

The Court: Didn't you get your cases from Mr. Phillips?

Mr. Samuels: Some of them; not all of them.

The Court: I agree with the argument of Mr. Kester here, and you are not going to get very much attorney's fees in this case. [54]

Mr. Samuels: The question is whether we should be in here?

The Court: I will determine it in a few days.

Mr. Phillips: Do you want any evidence from me, your Honor, as to what I did?

The Court: How much work did you do?

Mr. Phillips: I did a lot of it.

The Court: I can see that.

Mr. Phillips: Not only that, I did it personally, too, because I was interested in this question very much. I did more than the amount, I presume, indi-

cated. I have a file here, and I can tell pretty close. I think I must have put in between 50 and 75 hours on this thing, looking up the law and writing proposed pre-trial orders.

The Court: I know that you spent a lot of time. I can see that.

Mr. Phillips: Too much.

The Court: The question involved is whether or not this is the type of proceeding which the law attempted to cover.

Mr. Phillips: In my humble opinion, your Honor, there isn't any question about that, for two reasons, both under the statute and under your equitable authority, because this thing had to be brought by someone. Otherwise we would have been litigating and litigating and litigating from now on. The only way to do it was for somebody to step in. The Oregon wouldn't do anything. They disclaimed any liability to me at first, and then finally [55] Mr. Kester got around and said for me to pay my five thousand first and then he would pay. Now, for instance, on September 12th here, his position was this:

“Since the U. S. F. & G. policy, in which Suter is the named insured, is other valid and collectible insurance applicable to this claim, it appears that Suter is not covered by the Oregon Auto policy with respect to this claim, and that his defense is the responsibility of the U. S. F. & G. Company.”

The Court: Is there anything in your claim which deals with the investigation of the claim?

Mr. Phillips: No, we didn't investigate it under the belief that they were on it. They told us all the time up until——

The Court: How did you defend the case without investigating it?

Mr. Phillips: We got a hold of Brewster and got on it right quick. That is the way we did. That is the only thing we could do.

The Court: You would not be entitled to recover for investigation?

Mr. Phillips: No, we are not asking any attorney's fee for investigation, your Honor. I am asking for the expenses of the investigation that they made when they finally found out that the Oregon was not going to cover. Then we had to jump in and see what we could do to investigate it. We didn't investigate [56] it or couldn't investigate it very long after the thing had broken and it was about to be tried. We were under the belief that the Oregon was on it. We didn't do anything. At the time that he filed this second suit, I think, down at Salem——

The Court: Did you pay for the principal defense of the case in Bend, Oregon?

Mr. Phillips: No. Brewster either called me or wrote me and said that he would divide it equally between Oregon and the U. S. F. & G. I wrote back to him and told him that would be fine with me. And then Mr. Kester wrote to him and told him no, he would not pay half; that he wanted it separated and segregated as to each one of us. So, based

on that—I don't know what bill he sent Mr. Kester, but he sent me a bill for four hundred and something. It is in the pre-trial order. That is reasonable under Mr. Kester's suggestion that it be split that way, after I had offered to pay half of it. That is what happened.

The Court: Mr. Brewster was defending Suter on your behalf?

Mr. Phillips: And the Houk Motor Company. I wouldn't say on my behalf I would say on behalf of Oregon now.

The Court: But at the time you designated Brewster to defend it was because Suter had been covered by your policy?

Mr. Phillips: I don't know about how Brewster got into that, your Honor. They told me a time or two that Brewster was not representing the U. S. F. & G., and then I got hold of George Brewster, and he told me that he had been approached by some independent [57] adjuster working for the United States Fidelity and Guaranty Company, and that he was hired by the United States Fidelity and Guaranty Company. So I said, "All right." I said, "If that is so, I think it is all right." I told him I would pay half.

The Court: You don't need a decision immediately on that point. Do you intend to appeal this case, Mr. Kester?

Mr. Kester: Yes, your Honor.

The Court: Therefore, it is desirable that I decide these other points immediately so that you may have that opportunity.

Mr. Phillips: We would like to have a cross-appeal if he is going to appeal it, your Honor. That is, in the event——

Mr. Kester: May I call attention to two matters that appear in the documents which the Court has not yet had a chance to examine. In the first place, it appears from Mr. Brewster's letter to the United States Fidelity and Guaranty Company dated July 8, 1950, five months before the trial over there, that he was employed by the General Adjustment Bureau to defend Suter. Now, may it be stipulated that the General Adjustment Bureau was acting for the U. S. F. & G.; not the Oregon Auto?

Mr. Phillips: I don't think there is any question about that, your Honor. I don't know anything about that. As I said before, that is what Casey told me.

Mr. Kester: It is in evidence, and by that it appears that the U. S. F. & G. had undertaken the defense at least by July. They made no tender to us until September. Now, when they did [58] make a tender I wrote this answer, this letter to Mr. Phillips.

Mr. Phillips: You don't need to read that.

Mr. Kester: I want to call it to the attention of the Court, because you read a portion of it and I want to read the remainder of it. I pointed out the exact language in the policy and I said that since the U. S. F. & G. policy is other valid and collectible insurance it appears that Suter is not covered. Now that is so long as the U. S. F. & G. is

valid and collectible insurance. Of course, when they pay out it ceases to be.

And in the final paragraph of that letter we expressed our willingness to defend Suter under a reservation of rights:

“Since you have requested Oregon Auto to take over the defense of Suter in the Marion County action, we wish to advise you that Oregon Automobile Insurance Company is willing to take over that defense, upon the understanding that by doing so it does not admit any liability under its policy either to Suter or the U. S. F. & G. Company, and does not waive, surrender or in any way affect any of its rights or defenses,” and so on.

In other words, if they had refused the defense we were willing to undertake it upon the understanding that all rights would be preserved. So as far as either one being obligated to step in and take it as far as the other one was concerned, both companies were willing to defend Suter upon the understanding that by doing so the rights themselves would not be prejudiced. [59]

The Court: Did the U. S. F. & G. defend under a reservation of rights?

Mr. Phillips: I don't know, your Honor, whether they did or not.

Mr. Kester: If they did not, then they are estopped to ever deny——

Mr. Phillips: Estopped to deny what?

Mr. Kester: Coverage.

Mr. Phillips: What are you talking about?

Mr. Kester: If you undertake to defend a case, then you certainly can't claim that we should pay your expenses for doing so. That would have been an admission that you are obligated to defend.

The Court: All right. In the next few days I will render a decision.

(Thereupon proceedings in the above matter on said day were concluded.) [60]

REPORTER'S CERTIFICATE

I, John S. Beckwith, an Official Reporter of the above-entitled Court, do hereby certify that on March 19, March 28 and April 2, 1951, I reported in shorthand the proceeding had in the above-entitled matter, that I thereafter caused my said shorthand notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of Pages numbered 1 to 60, both inclusive, constitutes a full, true and accurate transcript of said proceedings so taken by me in shorthand on said dates, as aforesaid, and of the whole thereof.

Dated this 16th day of April, 1951.

/s/ JOHN S. BECKWITH,
Official Reporter.

[Endorsed]: Filed August 13, 1951.

[Title of District Court and Cause.]

DOCKET ENTRIES

1951

- Jan. 12—Filed petition for declaratory judgment.
- Jan. 12—Issued summons—to marshal.
- Jan. 22—Filed summons with return.
- Feb. 1—Filed answer of defs. Oregon Automobile
Ins. Co., Houk Motor & Redmond Motor.
- Feb. 5—Filed copy answer of defs. Oregon Auto-
mobile Ins. Co., Houk Motor & Redmond
Motor with acceptance of service by W. K.
Phillips.
- Feb. 6—Filed answer of defendants William and
Beulah Morris and cross-complaint.
- Feb. 8—Filed answer of deft. Oregon Automobile
Ins. Co. to cross-complaint of deft. Beulah
Morris.
- Feb. 19—Entered order setting for pre-trial confer-
ence Mar. 19 and trial Mar. 19 at 2 p.m.
- Mar. 19—Filed & entered pre-trial order.
- Mar. 19—Record of trial & submitted.
- Mar. 28—Record of oral opinion for plft. & order
setting for further argument on Monday,
April 2, 1951 at 2:00 p.m.
- Mar. 30—Filed petition of atty. Samuels for attor-
neys' fees.
- Mar. 30—Filed petition of atty. Phillips for attor-
ney's fees.
- Apr. 2—Record of hearing on certain questions of
law.

1951

Apr. 23—Filed transcript of proceedings March 19, 1951.

June 20—Record of oral opinion (in favor of pltf.).

July 19—Filed & entered findings of fact and conclusions of law.

July 19—Filed & entered judgment and decree.

Aug. 13—Filed notice of appeal by defendants and copies mailed to P. H. & S. and V. & S.

Aug. 13—Filed transcript of proceedings March 19-28, 1951 and April 2, 1951.

Aug. 13—Filed designation of contents of record on appeal.

Aug. 17—Filed supersedeas bond on appeal.

Aug. 17—Filed amended designation.

Aug. 17—Filed and entered order to send exhibits.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of petition for declaratory judgment, Answer of Oregon Automobile Insurance Co., Answer of William Morris, et al., Answer of Oregon Automobile Insurance Co. to cross-complaint, order for pre-trial conference, pre-trial order, oral opinion, order setting cause for argument, petition of Attorney

Samuels for fees, petition of Attorney Phillips for fees, findings of fact and conclusions of law, judgment and decree, notice of appeal by Oregon Automobile Insurance Company, supersedeas bond, order to send exhibits to Court of Appeals, designation of contents of record, amended designation, and transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 5890, in which the United States Fidelity & Guaranty Company, a corporation, is plaintiff and appellee, and the Oregon Automobile Insurance Company is defendant and appellant, and William Morris and Beulah Morris are defendants, and appellees; that the said record has been prepared by me in accordance with the amended designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith a duplicate transcript of testimony of March 19, March 28, and April 2, 1951, filed in this office in this cause, together with exhibits Nos. 1, 2, 11 to 20 inc., 23 to 26 inc.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 21st day of August, 1951.

[Seal]

LOWELL MUNDORFF,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy. [19]

[Endorsed]: No. 13092. United States Court of Appeals for the Ninth Circuit. Oregon Automobile Insurance Company, Appellant, vs. United States Fidelity and Guaranty Company, a Corporation, Beulah Morris and William Morris, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed September 12, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13092

OREGON AUTOMOBILE INSURANCE COM-
PANY,

Appellant,

vs.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation, RAY-
MOND SUTER, WILLIAM MORRIS and
BEULAH MORRIS,

Appellees.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Appellant, Oregon Automobile Insurance Com-
pany, hereby submits the following statement of
points on which it intends to rely on the appeal of
this cause:

1. The trial court erred in making and entering
its conclusion of law No. I, which was as follows,
to wit:

That the Oregon Automobile Insurance Com-
pany by virtue of its policy of insurance Pre-
Trial Ex. 2, did insure and cover Raymond
Suter and did protect him against legal liability
for damages arising out of the accident which
occurred on the 15th day of October, 1949, be-
tween the Mercury automobile which he was
driving and that driven by William Morris, in
Deschutes County, Oregon.

2. The trial court erred in making and entering its conclusion of law No. II, which was as follows, to wit:

That by virtue of its policy of insurance, the Oregon Automobile Insurance Company was required to defend the said Raymond Suter in all actions brought against him for damages arising out of that said accident and to pay all expenses of his defense, and any resulting judgments rendered against him up to the limits of their disclosed liability, but not more than One Hundred Thousand (\$100,000.00) Dollars, and costs of defense.

3. The trial court erred in making and entering its conclusion of law No. III, which was as follows, to wit:

That the policy of the Oregon Automobile Insurance Company, provides the primary coverage and insurance insuring the said Raymond Suter, and that policy written by the U. S. Fidelity and Guaranty Company "Pre-Trial Ex. I," is excess insurance and secondary to that provided by the defendant, Oregon Automobile Insurance Company and that there is not, nor was there any liability on the part of the U. S. Fidelity & Guaranty Company to defend Raymond Suter, or pay any judgments against him until the Oregon Automobile Insurance Company had expended the full amount of its coverage.

4. The trial court erred in making and entering

its conclusion of law No. IV, which was as follows, to wit:

That Beulah Morris is entitled to recover off of and from the defendant, Oregon Automobile Insurance Company the sum of Seven Thousand Four Hundred Seventy-Four and 83/100 (\$7,474.83) Dollars, together with interest thereon at the rate of (6%) Six per cent per annum from the 20th day of November, 1950.

5. The trial court erred in making and entering its conclusion of law No. V, which was as follows, to wit:

That Beulah Morris is entitled to recover off of and from the defendant, Oregon Automobile Insurance Company, the sum of Two Hundred and Fifty (\$250.00) Dollars attorneys fees for prosecuting their declaratory judgment suit.

6. The trial court erred in making and entering its conclusion of law No. VI, which was as follows, to wit:

That the plaintiff the U. S. Fidelity and Guaranty Company is entitled to recover off of and from the defendant, Oregon Automobile Insurance Company the sum of Seven Hundred Forty-five and 83/100 (\$745.83) Dollars, together with interest thereon at the rate of (6%) Six per cent per annum from the 26th day of December, 1950.

7. The trial court erred in making and entering its conclusion of law No. VII, which was as follows, to wit:

That Beulah Morris is not entitled to any recovery from the plaintiff the U. S. Fidelity and Guaranty Company.

8. The trial court erred in making the following determination and declaration in its judgment and decree dated July 19, 1951, to wit:

That the insurance policy issued by the Oregon Automobile Insurance Company, policy #332583, did insure and cover Raymond Suter and that the said Oregon Automobile Insurance Company is required to pay on behalf of the said Raymond Suter all sums which he became legally obligated to pay, and all damages and costs assessed against him, because of personal injury or property damages sustained and suffered by either or both William Morris and Beulah Morris by virtue of that said accident which happened on or about the 15th day of October, 1949, in the county of Deschutes, state of Oregon.

9. The trial court erred in making and entering the following determination and declaration in its judgment and decree dated July 19, 1951, to wit:

That the said policy of insurance written by the Oregon Automobile Insurance Company is primary insurance for the benefit of the said Raymond Suter, and the policy made, executed and delivered by the plaintiff, United States Fidelity and Guaranty Company, is excess insurance to that written by the Oregon Automobile Insurance Company, or secondary, and

that the plaintiff, United States Fidelity and Guaranty Company is not required to pay or to assume any obligation whatsoever by virtue of its policy for the legal liability of Raymond Suter to William Morris and or Beulah Morris until such time as the Oregon Automobile Insurance Company has expended the full face of its policy, namely \$100,000.00.

10. The trial court erred in awarding judgment against the Oregon Automobile Insurance Company and in favor of the defendant Beulah Morris in the sum of \$7,360.00, plus costs in the sum of \$114.43, together with interest on the said sums at the rate of 6% per annum from the 27th day of November, 1950.

11. The trial court erred in awarding judgment against the defendant Oregon Automobile Insurance Company and in favor of the defendant Beulah Morris in the sum of \$250.00 attorney's fees.

12. The trial court erred in awarding judgment against the defendant Oregon Automobile Insurance Company and in favor of the plaintiff United States Fidelity & Guaranty Company for the sum of \$745.83, together with interest thereon at the rate of 6% per annum from the 26th day of December, 1950.

13. The trial court erred in refusing to grant judgment in favor of the defendant Beulah Morris and against the plaintiff United States Fidelity and Guaranty Company.

14. The trial court erred in refusing to hold that

with respect to the action brought by Beulah Morris in Marion County, the policy of Oregon Automobile Insurance Company does not apply to defendant Raymond Suter, and said Oregon Automobile Insurance Company was and is under no obligation whatsoever with respect to his defense, or any expense arising therefrom.

15. The trial court erred in refusing to hold that with respect to the action brought in Deschutes County by said Beulah Morris, in which judgment was rendered against defendant Suter, defendant Oregon Automobile Insurance Company was under no obligation with respect to the defense of said Raymond Suter, and is under no obligation with respect to the expense thereof or to payment of said judgment against Raymond Suter, costs or interest, until plaintiff herein has applied upon payment of said judgment the limits of its said policy of insurance.

16. The trial court erred in refusing to hold that with respect to the action brought in Deschutes County by William Morris, defendant Oregon Automobile Insurance Company was not and is not obligated under its policy of insurance as to defendant Raymond Suter with respect to the cause of action for personal injuries to said William Morris or the cause of action for property damage of said William Morris, nor with respect to the cause of action for loss of consortium arising out of personal injuries to Beulah Morris until plaintiff has exhausted the limits of its policy of insurance.

17. The trial court erred in refusing to hold that plaintiff herein was and is required to accept liability and defend the action brought by William Morris against Raymond Suter in the Circuit Court of the State of Oregon for the County of Deschutes, on behalf of defendant Raymond Suter, pursuant to the terms of plaintiff's said policy of insurance.

18. The trial court erred in refusing to hold that plaintiff herein is required to satisfy the judgment in the action of Beulah Morris against Raymond Suter, No. 7784 in Deschutes County, Oregon, up to and including the limits of plaintiff's liability under its said policy.

19. The trial court erred in refusing to hold that the defendant, Oregon Automobile Insurance Company, is not indebted to the plaintiff in any amount.

20. The trial court erred in refusing to hold that the defendant, Oregon Automobile Insurance Company, is not indebted to defendant Beulah Morris in any amount at this time, and will not be indebted to her in any amount until plaintiff has exhausted the limits of liability of its insurance as to the judgment in her favor in Deschutes County.

21. The trial court erred in refusing to hold that neither the plaintiff nor the defendants Beulah Morris or William Morris are entitled to recover attorneys fees in this cause from the Oregon Automobile Insurance Company.

22. The trial court erred in refusing to hold that the policy of plaintiff was and is valid and collectible insurance available to and covering said

Raymond Suter with respect to liability arising out of said accident, within the meaning of the policy of Oregon Automobile Insurance Company.

23. The trial court erred in refusing to hold that the policy of Oregon Automobile Insurance Company was not and is not valid and collectible insurance available to or covering said Raymond Suter with respect to liability arising out of said accident.

Respectfully submitted,

/s/ RANDALL B. KESTER,

Of Attorneys for Appellant,
Oregon Automobile Ins. Co.

Service of copy acknowledged.

[Endorsed]: Filed September 15, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF PRINTED RECORD ON APPEAL

Appellant, Oregon Automobile Insurance Company, hereby designates as material to the consideration of the appeal herein, and for inclusion in the printed record on appeal, the entire record and all proceedings and evidence in the action, more particularly described as follows, to wit:

1. Petition for declaratory judgment (Transcript, document No. 1);
2. Answer of defendants Oregon Automobile Insurance Company, Houk Motor Company and Red-

mond Motor Company (Transcript, document No. 2);

3. Answer and cross-complaint of William and Beulah Morris (Transcript, document No. 3);

4. Answer of defendant Oregon Automobile Insurance Company to cross-complaint of defendant Beulah Morris (Transcript, document No. 4);

5. Order setting for pre-trial conference (Transcript, document No. 5);

6. Pre-trial order (Transcript, document No. 6);

7. Record of oral opinion for plaintiff and order setting for further argument (Transcript, document No. 7);

8. Petition of attorney Samuels for attorney's fees (Transcript, document No. 8);

9. Petition of attorney Phillips for attorney's fees (Transcript, document No. 9);

10. Findings of fact and conclusions of law (Transcript, document No. 10);

11. Judgment and decree (Transcript, document No. 11);

12. Defendants' notice of appeal (Transcript, document No. 12);

13. Transcript of proceedings of March 19 and 28 and April 2, 1951 (Transcript, document No. 13);

14. Order for transmittal of exhibits (Transcript, document No. 14);

15. Supersedeas bond on appeal (Transcript, document No. 15);

16. Designation of contents of record on appeal (Transcript, document No. 16);

17. Amended designation of contents of record on appeal (Transcript, document No. 17) ;
18. Transcript of docket entries (Transcript, document No. . .) ;
19. Clerk's certificate of transcript (Transcript, document No. . .) ;
20. All exhibits ;
21. Appellant's statement of points on which appellant intends to rely ;
22. This designation of contents of printed record on appeal.

Respectfully submitted this 13th day of September, 1951.

/s/ RANDALL B. KESTER,
Of Attorneys for Appellant,
Oregon Automobile Ins. Co.

Service of copy acknowledged.

[Endorsed]: Filed September 15, 1951.

United States
Court of Appeals
For the Ninth Circuit

OREGON AUTOMOBILE INSURANCE COMPANY,
Appellant,

vs.

UNITED STATES FIDELITY AND GUARANTY
COMPANY, a Corporation, BEULAH MORRIS
and WILLIAM MORRIS,
Appellees.

Brief for Appellant

Appeal from the United States District Court for
the District of Oregon

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FILED

DEC 26 1951

PAUL P. O'BRIEN
CLERK

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United States
Court of Appeals
For the Ninth Circuit

OREGON AUTOMOBILE INSURANCE COMPANY,
Appellant,

vs.

UNITED STATES FIDELITY AND GUARANTY
COMPANY, a Corporation, BEULAH MORRIS
and WILLIAM MORRIS,
Appellees.

Brief for Appellant

Appeal from the United States District Court for
the District of Oregon

JURISDICTION

This is a declaratory judgment proceeding brought by appellee, United States Fidelity and Guaranty Company, to determine the effect and applicability of two policies of liability insurance—one issued by the appellant, Oregon Automobile Insurance Company (hereinafter referred to as Oregon), and the other issued by the appellee, United States Fidelity and Guaranty Company (hereinafter referred to as U. S. F. & G.).

Jurisdiction is based upon the Federal Declaratory Judgment Act (28 U. S. C. §2201) and upon diversity of citizenship (28 U. S. C. §1332). It is stipulated that the U. S. F. & G. is a Maryland corporation (R. 48), the Oregon is an Oregon corporation (R. 48), the appellees Beulah and William Morris (husband and wife) are residents and inhabitants of the State of Washington (R. 49), and the amount in controversy exceeds the sum of \$3,000.00, exclusive of interest, costs and attorneys' fees (R. 49).

The case was tried to the Court without a jury, and the trial court made Findings of Fact and Conclusions of Law (R. 68). The final Judgment of the District Court was entered on July 19, 1951 (R. 81), and the Notice of Appeal was filed August 13, 1951 (R. 84). Jurisdiction of this court to review the judgment is based upon 28 U. S. C. §1291.

STATEMENT OF THE CASE

The Facts

In this case substantially all of the material facts have been stipulated in the Pre-Trial Order (R. 48), and the only issues are purely legal questions as to the interpretation and application of the two insurance policies (R. 88-90).

The U. S. F. & G. issued its automobile liability policy to Ray E. Suter and/or Lela Suter, for the period June 4, 1949, to June 4, 1950, insuring them against liability for damages because of bodily injury or destruction of property arising out of the

use of a Plymouth automobile, with limits of \$5,000.00 for each person injured, \$10,000.00 for all persons injured in any one accident, and \$5,000.00 for property damage (Ex. 1, R. 92, R. 15).

The U. S. F. & G. policy also provided coverage for the Suters with respect to the use of any other automobile. The full text of its "Insuring Agreement V—Use of Other Automobiles" is set forth *infra*, pp. 16-17 (R. 16).

The Oregon issued its combined automobile policy to Houk Motor Co., Redmond Motor Co. and Redmond Tractor Co., for the period October 1, 1949, to October 1, 1950, insuring them, among other things, against liability for damages because of bodily injury or destruction of property arising out of the operation of described motor vehicles. The limits of the Oregon policy were \$100,000.00 for each personal injury, \$100,000.00 for all injuries in each accident, and \$5,000.00 for property damage (Ex. 2, R. 93).

Insofar as is material to this case, the Oregon policy also provided coverage to any other person or organization with respect to the use of any automobile otherwise covered by the policy. The full text of its extended coverage clause is set forth, *infra*, pp. 18-19 (R. 97).

Both policies contained provisions dealing with the existence of other insurance. The U. S. F. & G. policy provided, in substance, that it would pro-rate with other valid and collectible insurance, except

that with respect to the use of other automobiles, it would be excess insurance only. The applicable provision is set forth, *infra*, pp. 17-18 (R. 17-18).

The Oregon policy provided, in substance, that it would pro-rate with other valid and collectible insurance, except that as to any one other than a named insured, if such person had other valid and collectible insurance, then he would not be indemnified at all under the Oregon policy. The applicable provisions are set forth *infra*, p. 19 (R. 94-6).

The accident out of which this controversy arose occurred on October 15, 1949, when Raymond Suter (a named insured under the U. S. F. & G. policy) was driving an automobile belonging to the Redmond Motor Company (a named insured under the Oregon policy). Suter collided with an automobile owned and driven by William Morris, in which his wife, Beulah Morris, was riding. As a result of the accident Beulah Morris sustained personal injuries and William Morris sustained personal injuries and damage to his car (R. 50).

Following the accident Beulah Morris commenced an action for her personal injuries in Deschutes County, Oregon, against Raymond Suter, Houk Motor Company, and one James Stuchlik, who is not involved in this case. It will be noted that in this action the Redmond Motor Company, the owner of the car Suter was driving, was not sued, but the Houk Motor Company, another named insured under the Oregon policy, was sued (R. 50).

While the action in Deschutes County was still pending, Beulah Morris commenced another action in Marion County, Oregon, in which she sought to recover for the same injuries alleged in the Deschutes County action. In the Marion County action she sued Suter and Stuchlik only (R. 51).

Subsequently Beulah Morris abandoned and took a non-suit in the Marion County action and proceeded with the Deschutes County action, in which she finally obtained a judgment against Raymond Suter alone, in the sum of \$7,360.00 plus costs of \$114.83. The judgment was entered November 27, 1950, and draws six per cent interest. It has not been paid and is still in full force and effect (R. 50-51).

William Morris also commenced an action in Deschutes County, Oregon, in which he claimed damages for his own injuries in the amount of \$1,500.00, for property damage to his automobile in the amount of \$250.00, and for loss of consortium due to his wife's injuries in the amount of \$7,500.00, all arising from the same accident. In this action he sued Raymond Suter, Redmond Motor Company and James Stuchlik (R. 51). At the time of the trial of the case at bar, the action of William Morris was still pending (R. 52).

In both actions brought by Beulah Morris, the U. S. F. & G. undertook the defense of Suter and in so doing incurred expenses and attorneys' fees (R. 52). The Oregon participated in the Deschutes County case to the extent of defending its named

insured, Houk Motor Co., but did not participate in the Marion County action. The question was raised below whether a sufficient tender of Suter's defense had been made to Oregon, but that question is not presented here, and for the purposes of this appeal it may be assumed that a sufficient tender was made.

The Controversy

The ultimate question in this case is which policy is primary and which is excess. The U. S. F. & G. contends that the Oregon must assume all liability on behalf of Suter, both as to Beulah and as to William Morris, and in addition pay the expenses of Suter's defense incurred by U. S. F. & G. (R. 53-54).

The Oregon contends that the U. S. F. & G. policy is "other valid and collectible insurance" available to Suter, and that so long as the U. S. F. & G. has not exhausted its policy limits, Suter is not covered by the Oregon policy. The Oregon admits that when the U. S. F. & G. pays its policy limits then it ceases to be "other collectible insurance", and that Oregon would then be liable to pay any balance remaining (R. 55-58).

The Morrisises of course want to collect for their damages, and no one denies that their claims would be within the coverage of one or the other of the two policies. The Morrisises have presented their claims in this proceeding (R. 54), but their rights will be fully protected regardless of which policy is held to be primary.

The trial court held that the Oregon policy is primary and the U. S. F. & G. policy excess; that Oregon is required to pay all damages recovered by either of the Morrisses against Suter; and it awarded judgments against Oregon for the expenses incurred by U. S. F. & G. in defending Suter, for the amount recovered by Beulah Morris against Suter, and also for attorneys' fees of Beulah Morris in the declaratory judgment proceeding (R. 78-83). From this declaration and judgment, Oregon appeals.

SPECIFICATIONS OF ERROR

The basic error of the trial court was in construing the Oregon policy as primary, and the U. S. F. & G. policy as excess, and in giving judgment accordingly, instead of holding the U. S. F. & G. policy to be primary and the Oregon policy to be excess, which appellant submits is the correct interpretation. This error appears in a number of ways in the trial court's Conclusions of Law and Judgment, and although there is some overlapping, appellant asserts that the trial court erred as a matter of law in each of the matters asserted in appellant's Statement of Points (R. 187-194), which are as follows:

1. The trial court erred in making and entering its conclusion of law No. I, which was as follows, to-wit:

“That the Oregon Automobile Insurance Company by virtue of its policy of insurance Pre Trial Ex. 2, did insure and cover Raymond

Suter and did protect him against legal liability for damages arising out of the accident which occurred on the 15th day of October, 1949, between the Mercury automobile which he was driving and that driven by William Morris, in Deschutes County, Oregon" (R. 78, 187).

2. The trial court erred in making and entering its conclusion of law No. II, which was as follows, to-wit:

"That by virtue of its policy of insurance, the Oregon Automobile Insurance Company was required to defend the said Raymond Suter in all actions brought against him for damages arising out of that said accident and to pay all expenses of his defense, and any resulting judgments rendered against him up to the limits of their disclosed liability, but not more than One Hundred Thousand (\$100,000.00) Dollars, and costs of defense" (R. 78, 188).

3. The trial court erred in making and entering its conclusion of law No. III, which was as follows, to-wit:

"That the policy of the Oregon Automobile Insurance Company, provides the primary coverage and insurance insuring the said Raymond Suter, and that policy written by the U. S. Fidelity and Guaranty Company 'Pre Trial Ex. I', is excess insurance and secondary to that provided by the defendant, Oregon Automobile Insurance Company and that there is not, nor was there any liability on the part of the U. S. Fidelity & Guaranty Company to defend Raymond Suter, or pay any judgments against him until

the Oregon Automobile Insurance Company had expended the full amount of its coverage" (R. 78-9, 188).

4. The trial court erred in making and entering its conclusion of law No. IV, which was as follows, to-wit:

"That Beulah Morris is entitled to recover off of and from the defendant, Oregon Automobile Insurance Company the sum of Seven Thousand Four Hundred Seventy-Four and 83/100 (\$7,474.83) Dollars, together with interest thereon at the rate of (6%) Six per cent per annum from the 20th day of November, 1950" (R. 79, 188-9).

5. The trial court erred in making and entering its conclusion of law No. V, which was as follows, to-wit:

"That Beulah Morris is entitled to recover off of and from the defendant, Oregon Automobile Insurance Company, the sum of Two Hundred and Fifty (\$250.00) Dollars attorneys fees for prosecuting their declaratory judgment suit" (R. 79, 189).

6. The trial court erred in making and entering its conclusion of law No. VI, which was as follows, to-wit:

"That the plaintiff the U. S. Fidelity and Guaranty Company is entitled to recover off of and from the defendant, Oregon Automobile Insurance Company the sum of Seven Hundred Forty-five and 83/100 (\$745.83) Dollars, together with interest thereon at the rate of (6%)

Six per cent per annum from the 26th day of December, 1950" (R. 79-80, 189).

7. The trial court erred in making and entering its conclusion of law No. VII, which was as follows: to-wit:

"That Beulah Morris is not entitled to any recovery from the plaintiff the U. S. Fidelity and Guaranty Company" (R. 80, 189-190).

8. The trial court erred in making the following determination and declaration in its judgment and decree dated July 19, 1951, to-wit:

"That the insurance policy issued by the Oregon Automobile Insurance Company, policy #332583, did insure and cover Raymond Suter and that the said Oregon Automobile Insurance Company is required to pay on behalf of the said Raymond Suter all sums which he became legally obligated to pay, and all damages and costs assessed against him, because of personal injury or property damages sustained and suffered by either or both William Morris and Beulah Morris by virtue of that said accident which happened on or about the 15th day of October, 1949, in the county of Deschutes, State of Oregon" (R. 81-2, 190).

9. The trial court erred in making and entering the following determination and declaration in its judgment and decree dated July 19, 1951, to-wit:

"That the said policy of insurance written by the Oregon Automobile Insurance Company is primary insurance for the benefit of the said Raymond Suter, and the policy made, executed

and delivered by the plaintiff, United States Fidelity and Guaranty Company, is excess insurance to that written by the Oregon Automobile Insurance Company, or secondary, and that the plaintiff, United States Fidelity and Guaranty Company is not required to pay or to assume any obligation whatsoever by virtue of its policy for the legal liability of Raymond Suter to William Morris and or Beulah Morris until such time as the Oregon Automobile Insurance Company has expended the full face of its policy, namely \$100,000.00" (R. 82, 190-1).

10. The trial court erred in awarding judgment against the Oregon Automobile Insurance Company and in favor of the defendant Beulah Morris in the sum of \$7,360.00, plus costs in the sum of \$114.43, together with interest on the said sums at the rate of 6% per annum from the 27th day of November, 1950 (R. 82, 191).

11. The trial court erred in awarding judgment against the defendant Oregon Automobile Insurance Company and in favor of the defendant Beulah Morris in the sum of \$250.00 attorneys' fees (R. 83, 191).

12. The trial court erred in awarding judgment against the defendant Oregon Automobile Insurance Company and in favor of the plaintiff United States Fidelity & Guaranty Company for the sum of \$745.83, together with interest thereon at the rate of 6% per annum from the 26th day of December, 1950 (R. 83, 191).

13. The trial court erred in refusing to grant judgment in favor of the defendant Beulah Morris and against the plaintiff United States Fidelity and Guaranty Company (R. 83, 191).

14. The trial court erred in refusing to hold that with respect to the action brought by Beulah Morris in Marion County, the policy of Oregon Automobile Insurance Company does not apply to defendant Raymond Suter, and said Oregon Automobile Insurance Company was and is under no obligation whatsoever with respect to his defense, or any expense arising therefrom (R. 191-2).

15. The trial court erred in refusing to hold that with respect to the action brought in Deschutes County by said Beulah Morris, in which judgment was rendered against defendant Suter, defendant Oregon Automobile Insurance Company was under no obligation with respect to the defense of said Raymond Suter, and is under no obligation with respect to the expense thereof or to payment of said judgment against Raymond Suter, costs or interest, until plaintiff herein has applied upon payment of said judgment the limits of its said policy of insurance (R. 192).

16. The trial court erred in refusing to hold that with respect to the action brought in Deschutes County by William Morris, defendant Oregon Automobile Insurance Company was not and is not obligated under its policy of insurance as to defendant Raymond Suter with respect to the cause of action

for personal injuries to said William Morris or the cause of action for property damage of said William Morris, nor with respect to the cause of action for loss of consortium arising out of personal injuries to Beulah Morris until plaintiff has exhausted the limits of its policy of insurance (R. 192).

17. The trial court erred in refusing to hold that plaintiff herein was and is required to accept liability and defend the action brought by William Morris against Raymond Suter in the Circuit Court of the State of Oregon for the County of Deschutes, on behalf of defendant Raymond Suter, pursuant to the terms of plaintiff's said policy of insurance (R. 193).

18. The trial court erred in refusing to hold that plaintiff herein is required to satisfy the judgment in the action of Beulah Morris against Raymond Suter, No. 7784 in Deschutes County, Oregon, up to and including the limits of plaintiff's liability under its said policy (R. 193).

19. The trial court erred in refusing to hold that the defendant, Oregon Automobile Insurance Company, is not indebted to the plaintiff in any amount (R. 193).

20. The trial court erred in refusing to hold that the defendant, Oregon Automobile Insurance Company, is not indebted to defendant Beulah Morris in any amount at this time, and will not be indebted to her in any amount until plaintiff has exhausted the

limits of liability of its insurance as to the judgment in her favor in Deschutes County (R. 193).

21. The trial court erred in refusing to hold that neither the plaintiff nor the defendants Beulah Morris or William Morris are entitled to recover attorneys' fees in this cause from the Oregon Automobile Insurance Company (R. 193).

22. The trial court erred in refusing to hold that the policy of plaintiff was and is valid and collectible insurance available to and covering said Raymond Suter with respect to liability arising out of said accident, within the meaning of the policy of Oregon Automobile Insurance Company (R. 193-4).

23. The trial court erred in refusing to hold that the policy of Oregon Automobile Insurance Company was not and is not valid and collectible insurance available to or covering said Raymond Suter with respect to liability arising out of said accident (R. 194).

ARGUMENT

Summary of Argument

1. As between two policies, either of which would apply in the absence of the other, the policy of earlier date is primary, and the later policy is excess.

New Amsterdam Cas. Co. v. Hartford Acc. & Indem. Co., 108 F. (2d) 653 (6th Cir., 1940);

Michigan Alkali Co. v. Bankers' Indem. Ins. Co., 103 F. (2d) 345 (2nd Cir., 1939);

Gutner v. Switzerland Gen. Ins. Co., 32 F. (2d) 700 (2d Cir., 1929);

Auto Ins. Co. of Hartford v. Springfield Dyeing Co., 109 F. (2d) 533 (3rd Cir., 1940).

2. Where there is a garage liability policy covering a number of risks, including the operation of automobiles owned by the garage, and an individual driver has a policy covering his operation of automobiles, the garage policy is general and the individual policy is specific, so that as between them the individual policy is primary.

Hartford Steam Boiler Insp'n. & Ins. Co. v. Cochran Oil Mill Co., 26 Ga. App. 288, 105 S.E. 856 (1921);

Trinity Universal Ins. Co. v. Gen. Acc. F. & L. A. Corp., 138 Ohio St. 488, 35 N.E. (2d) 836 (1941).

3. Where the driver is the actual tort feisor, and the owner is either not liable in tort or only secondarily liable, the company whose named insured is the driver is the primary insurer.

American Auto Ins. Co. v. Penn. Mutual Indem. Co., 161 F. (2d) 62 (3rd Cir., 1947);

Maryland Cas. Co. v. Bankers' Indem. Co., 51 Ohio App. 323, 200 N.E. 849 (1935);

Commercial Cas. Co. v. Hartford Acc. & Indem. Co., 190 Minn. 528, 252 N.W. 434, 253 N.W. 888 (1934).

4. Regardless of which policy is primary as to the ultimate liability, an insurer owes the primary duty of defense to its own named insured.

Continental Cas. Co. v. Curtis Pub. Co., 94 F. (2d) 710 (3rd Cir., 1938).

The Policy Provisions

The portion of the U. S. F. & G. policy which provides coverage for Suter while driving the car owned by Redmond Motor Company is found in "Insuring Agreement V—Use of Other Automobiles." That agreement is as follows:

"V Use of Other Automobiles

If the Named Insured is an individual who owns the automobile classified as 'pleasure and business' or husband and wife either or both of whom own said automobile, *such insurance* as is afforded by this policy with respect to said automobile *applies with respect to any other automobile*, subject to the following provisions:*

- (a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'Insured' includes

- (1) such Named Insured, (2) the spouse of such individual if a resident of the same household and (3) any other person or organization legally responsible for the use by such Named Insured or spouse of an automobile not owned or hired by such

* All italics herein supplied unless otherwise indicated.

other person or organization. Insuring Agreement III, Definition of Insured, does not apply to this insurance.

(b) This insuring agreement does not apply:

- (1) to any automobile owned by, hired as part of a frequent use of hired automobiles by, or furnished for regular use to the Named Insured or a member of his household other than a private chauffeur or domestic servant of the Named Insured or spouse;
- (2) to any automobile while used in the business or occupation of the Named Insured or spouse except a private passenger automobile operated or occupied by such Named Insured, spouse, chauffeur or servant;
- (3) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place;
- (4) under coverage C, unless the injury results from the operation of such other automobile by such Named Insured or spouse or on behalf of either by such chauffeur or servant, or from the occupancy of said automobile by such Named Insured or spouse." (R. 16.)

The U. S. F. & G. clause dealing with other insurance is found in paragraph 12 of the conditions, which provides as follows:

"12. Other Insurance—Coverages A and B

If the Insured has other insurance against

a loss covered by this policy the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declaration bears to the total applicable limit of liability of all valid and collectible insurance against such loss; *provided, however, the insurance with respect to temporary substitute automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible insurance available to the Insured*, either as an Insured under a policy applicable with respect to said automobiles or otherwise.” (R. 17-18).

The provision of the Oregon policy which extended coverage to Suter while driving the car owned by Redmond Motor Company is a part of Endorsement #3, and so far as material here, it provides as follows:

“It is agreed that such insurance as is afforded by the policy for Bodily Injury Liability and for Property Damage Liability applies subject to the following provisions:

★ ★ ★

“2. To any other person or organization, as insured, provided:

the insurance applies only if the named insured’s operations are classified as ‘automobile dealer or repair shop’ and only with respect to the use, for such business operations or for pleasure purposes, of any auto-

mobile covered under such classification.”
(R. 97).

The “Other Insurance” clause of the Oregon policy appears in paragraph 11 of the Conditions, and is as follows:

“11. Other Insurance. If the Insured has other insurance against a loss covered by this policy the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the Warranties bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, that the insurance under Paragraph ‘DRIVE OTHER PRIVATE PASSENGER AUTOMOBILES’ shall be excess insurance over any other valid and collectible insurance available to the Insured either as an Insured under a policy applicable with respect to the automobile or otherwise, against a loss covered under said paragraph, and *further this Company will not be liable if any other person, firm or corporation indemnified hereunder is covered by valid and collectible insurance against a claim also covered by this policy, such other person, firm or corporation shall not be indemnified under this policy.*” (R. 95-6).

It will be noted that the “Additional Assured” clause of the basic Oregon policy (bottom of page R. 94) contains provisions similar to those just quoted. That is, the insurance applies to “any per-

son while legally operating any automobile described . . .”, and it is expressly provided that “any Additional Insured who is covered by valid and collectible insurance against a claim also covered hereby shall have no right of recovery under this policy” (R. 94-5).

While the general language of the “Additional Assured” clause may be superseded by the more specific garage liability endorsement, the effect for the purposes of this case is just the same. That is, if anyone other than the named insured has other valid and collectible insurance available under any other policy, then he is not covered by the Oregon policy.

The effect of the “other insurance” clause in each policy is the same as in the other. Although the Oregon policy says that anyone other than the named insured is not covered at all in the event of other insurance, the effect is the same as if it had said it would be excess only, for as soon as the limits of the other policy are exhausted then the other ceases to be “collectible” and the Oregon policy could then be invoked, as excess coverage.

The Problem of Primary and Excess Coverage

The Court will observe that if both policies were taken literally, then there would be an impasse. Either policy would cover, in the absence of the other, but each policy would be suspended so long as the other one exists. To give effect to both “other insurance” clauses would be to nullify both policies.

Since the personal injury claimants are obviously entitled to protection under one or the other, some way must be found to determine which policy is primary and which is secondary. Such a decision will necessarily do violence to the "other insurance" clause in one policy or the other, and the court is faced with the difficult problem of deciding which policy must be sacrificed in order to give effect to the other.

In struggling with this problem the courts have found it difficult to avoid circuitry of reasoning. Unfortunately some courts have passed it off by merely assuming that one policy or the other is primary, without expressing any reasons, and such decisions are of little help. From those cases which attempt to analyze the question, the following principles can be gleaned:

- (1) The policy of prior date is ordinarily primary, since at the time of its issuance there is no "other insurance", and when the subsequent policy attaches it covers only what the former policy omits.
- (2) As between policies of different character the one which relates more specifically to a given risk is primary, and one which includes that risk only generally is secondary.
- (3) Where each policy has a different named assured, each insurer is primarily responsible for losses caused by its named assured and only

secondarily responsible for others who are incidentally covered.

When these factors occur in different combinations, the results are sometimes hard to predict. However, in the present case all of these reasons point in the same direction and operate to make the U. S. F. & G. policy primary and that of the Oregon secondary or excess only.

In *Kearns Coal Corp v. United States Fidelity & Guaranty Co.*, 118 F. (2d) 33 (2d Cir., 1941), cert. den. 313 U.S. 579, where the defendant was the same insurance company as is plaintiff here, that company insured the truck owner with an omnibus clause having the same provision that the Oregon policy has in this case, excluding coverage for an additional assured who has other valid and collectible insurance. The Travelers Insurance Company by a prior policy insured the user of the truck with respect to hired automobiles, with a provision limiting its coverage to excess only, just like the plaintiff's policy here. The U. S. F. & G. in that case asserted the same proposition which it is denying in this case—namely that the owner's policy did not apply because the operator's policy was other valid and collectible insurance. While the court placed its decision on other grounds, its discussion of this problem is helpful:

“These clauses, as the precedents show, afford excellent opportunity for circular reasoning: if or since Fidelity is not bound, Travelers is; and

vice versa. In view of what we have held above, we need not decide this troublesome issue further than to say that of the several theories extant two at least favor the defendant: one that *the policy date controls* and defendant's policy, being later in date, though seemingly a renewal of some earlier policy, covers only what the Travelers policy did not cover; and the other that, since protection of the named assured was the chief purpose of each contract, *each insurer should bear primary responsibility for losses of his named assured* and only secondary responsibility, after primary funds have failed, for other losses." (118 F. (2d) 33, 35; italics supplied.)

I.

The U. S. F. & G. policy, being prior in date, is primary.

The undisputed facts are that the U. S. F. & G. policy was issued for the year commencing June 4, 1949 (Ex. 1, R. 92, 15), and the Oregon policy was issued for the year commencing October 1, 1949 (Ex. 2, R. 93). The accident happened October 15, 1949 (R. 50). At the time the U. S. F. & G. policy was issued there was no other insurance available under the Oregon policy because it did not exist.

In the case of *New Amsterdam Cas. Co. v. Hartford Acc. & Indem. Co.*, 108 F. (2d) 653 (6th Cir., 1940), there was a leased vehicle involved. The lessor had a policy with the Hartford which extended coverage to any permissive driver, as an additional assured, but which excluded coverage if

such additional assured had other insurance (the same type of provisions as in Oregon's policy here). The lessor's policy as originally issued excluded coverage while the vehicle was rented to others, but by subsequent endorsement it had been extended to cover the particular vehicle involved in the case. The lessee in the meantime had obtained a policy from the Amsterdam which covered the operation of all automobiles by the named assured, and which provided that it would be excess only if the owner of the vehicle had other insurance (the same type of provision as in the U. S. F. & G. policy here). Since the lessee's policy was in effect prior to the endorsement on the lessor's policy (both being in effect at the time of the accident), and the lessee was solely responsible for the accident, the court held the lessor's policy was not the primary insurance. The lessor in that case was in the same position as the Redmond Motor Co. in this case, and the lessee was in the same position as Suter in this case.

In *Michigan Alkali Co. v. Bankers' Indem. Ins. Co.*, 103 F. (2d) 345 (2d Cir., 1939), the facts were reversed from the *New Amsterdam* case in that the owner's policy had been issued first and the lessee-operator's policy was later in date. Consequently the court held the owner's earlier policy to be primary, which is consistent with the *New Amsterdam* case. The court also points out that under New York statutes the owner would be liable for the negligence of the renter if it did not carry liability insurance covering the renter, and that as a term of the

lease the owner had agreed to carry insurance covering the renter. This was an additional reason for holding the owner's insurance to be primary.*

In *Gutner v. Switzerland General Ins. Co.*, 32 F. (2d) 700 (2d Cir., 1929), two separate policies of cargo insurance had been obtained covering goods in transit. Each contained a clause providing that it was to be excess only, over any other insurance. The court held that the first policy issued was the primary insurance, since at the time of its issuance there was no other insurance in effect, and denied recovery against the second insurer except for the excess.

The rule of prior insurance being primary was also invoked in *Auto Ins. Co. of Hartford v. Springfield Dyeing Co.*, 109 F. (2d) 533 (3rd Cir., 1940), where a bailee's policy insuring against damage to goods in its possession was issued prior to a policy taken out by the bailor, and the goods were stolen while in the bailee's possession. Each policy provided that it would be excess over other insurance, and the bailee's prior policy was held to be primary.

The result of the foregoing decisions from the Second, Third and Sixth Circuits, would be to make the prior U. S. F. & G. policy primary in this case and the later Oregon policy excess only.

* Under Oregon law the owner is not liable for the negligence of a bailee, in the absence of agency, *Brown v. Fields*, 160 Or. 23, 83 P. (2d) 144; but if liability could be imposed vicariously on the owner his liability would be secondary, and he could have indemnity from the primary tort-feasor, *Astoria v. Astoria & Col. R. Ry. Co.*, 67 Or. 538, 136 Pac. 645.

II.

The U. S. F. & G. policy is more specific, and therefore primary.

It will be observed that the U. S. F. & G. policy provides only automobile liability and medical coverage (R. 15). The Oregon policy however provides a variety of coverages to its named insureds, including automobile liability; general garage liability for all work necessary to the conduct of the named insureds' business, both on and off the premises; cargo insurance for goods in custody of the insureds as common carriers; public liability coverage for operations under permit of the Oregon Public Utilities Commissioner; damage to property of the insureds themselves caused by collision of a hoist with any other object; fire, collision and related insurance for vehicles carried or towed by the insureds; liability insurance for hoist collisions; and blanket coverage for additional interests in connection with garage operations (R. 93-106).

Comparison of the two policies shows that the U. S. F. & G. policy is much narrower and more limited in scope than the Oregon's, and it follows that the U. S. F. & G. policy is the more specific. The only risks it assumed are of the precise type involved in this case—i.e. automobile operations—whereas the Oregon undertook a broad, general coverage including many risks not here involved.

In *Hartford Steam Boiler Inspection & Ins. Co. v. Cochran Oil Mill Co.*, 26 Ga. App. 288, 105 S.E.

856 (1921), the Georgia Casualty Co. had issued a policy of employers liability insurance to the Cochran Company, and the Hartford had issued a policy of boiler insurance to the same insured which covered (1) property damage, and (2) liability for personal injuries, as a result of boiler explosion. Each policy provided that it would be excess in the event of other insurance. An employee of Cochran Company was injured in a boiler explosion, and each company denied liability on the ground that it was excess only. The court discussed the question of "primary" and "excess" insurance at length, and concluded that the Georgia policy, being more limited in scope, was more specific and hence primary; and the Hartford policy, which covered a greater variety of risks, was more general and therefore excess.

The same rule was employed in *Trinity Universal Ins. Co. v. General Acc. F. & L. A. Corp.*, 138 Ohio St. 488, 35 N.E. (2d) 836 (1941), where the General issued a policy covering the liability of the assured as a result of an accident on the premises, but providing that it would be excess over any other insurance if the accident was due to an automobile. The Trinity issued a policy to the same assured covering liability from operation of a truck, and providing that it would not be liable for more than a pro rata share with other insurance. An accident having occurred with the truck, on the premises, the court held that the policy covering any injuries on

the premises was the more general, and the specific insurance on the truck was primary.

Under the foregoing reasoning, appellant submits that the more specific U. S. F. & G. policy should be primary and the more general Oregon policy should be excess.

III.

The accident having been caused by the named insured of U. S. F. & G., it should be primarily responsible.

It will be recalled that at the time of the accident Raymond Suter, who was U. S. F. & G.'s named assured, was driving a car owned by Redmond Motor Company, Oregon's named assured (R. 50). There is no claim here that Redmond was in any way responsible for, or legally liable for, any negligence of Suter. As pointed out above, under Oregon law an owner is not liable for negligence of a mere bailee (footnote, page 25, *supra*).

In *American Auto Ins. Co. v. Penn Mutual Indem. Co.*, 161 F. (2d) 62 (3rd Cir., 1947) the tortfeasor, Wasilindra (like Suter in this case), was driving a borrowed automobile belonging to one Pender (like Redmond Motor Co. in this case). Wasilindra had a driver's policy with American Auto which covered him while driving any car, but which was provided to be excess only if there was other insurance on the car (like the U. S. F. & G. policy here). The owner, Pender, had a policy which extended coverage to any permissive driver, but which did not apply to any person who had other valid or col-

lectible insurance (like the Oregon policy in this case). The driver's insurer, having been compelled by garnishment to pay the injured persons, sued the owner's insurer for reimbursement. The court, through Judge Goodrich, held that the driver's insurer was primarily responsible and denied the claim for reimbursement.

The *American Auto* case seems directly in point here. The same policy provisions were involved as in this case, and the two companies were in the same relative positions as here, except that the driver's insurer there had been required by the Financial Responsibility Act to pay the judgment in the first instance. As pointed out in the opinion however, the effect of the Financial Responsibility Act was merely with respect to the injured person and not between the companies. The court lays considerable stress on the fact that Wasilindra, plaintiff's insured, was the actual tortfeasor, and that the owner of the car was not liable to the injured person, just as in the present case.

In the case of *Maryland Casualty Co. v. Bankers Indemnity Co.*, 51 Ohio App. 323, 200 N.E. 849 (1935), there was a hired truck involved. The owner was insured by the Bankers with a policy extending coverage to permissive operators but which excluded coverage for any one other than the named assured who had other valid and collectible insurance (as the Oregon policy here). The lessee-operator had a policy with the Maryland which cov-

ered hired vehicles, but which provided that it would be excess only if the hired equipment had other insurance (as the U. S. F. & G. policy here). The accident occurred as the result of operation of the truck by the lessee, and the court held that the operator's policy was primary and the owner's policy was excess.

In *Commercial Cas. Co. v. Hartford Acc. & Ind. Co.*, 190 Minn. 528, 252 N.W. 434, 253 N.W. 888 (1934), an accident had occurred involving a truck owned by one Strom, an independent contractor, and operated by his driver, while on business for a general contractor, Hanlon & Oakes. Strom had a policy with the Commercial which covered anyone legally responsible for the use of the automobile, but which excluded coverage for any additional assured who had other insurance. The Hartford had insured the general contractors, Hanlon & Oakes, with respect to the use of automobiles owned by independent contractors, but not covering the operators of such vehicles. The Hartford policy provided that it was only excess over any owner's or operator's insurance which covered their named assured. The facts of the accident admittedly made the general contractors liable to the injured person, but the primary liability was on Strom, and the liability of Hanlon & Oakes was only secondary. The court therefore held that Strom's insurance was primary and that of the general contractor only secondary.

These cases illustrate what Judge Clark meant in the *Kearns* case, quoted *supra*, when he said that

“each insurer should bear primary responsibility for losses of his named assured” (118 F. (2d) at 35).

In this case, the Oregon never at any time had any contractual relationship with Suter, and the fact that Suter might become an additional assured under the Oregon policy by driving Redmond’s car was purely incidental to the main purpose of the Oregon policy, which was to protect its own named assureds.

On the other hand, protection of Suter was the principal purpose of the U. S. F. & G. policy. It was the only company that knew Suter, the company that could examine his driving record, that could charge a premium based upon his desirability as a risk, and which after evaluating all such factors had deliberately chosen to underwrite him as a driver. It is elementary that insurance is a highly personal contract,* and liability insurance is especially so.

Here, the Oregon had no choice, no opportunity to consider Suter as an individual, or to base a premium upon his desirability. He was merely one of an indefinite class of persons that might or might not be driving cars owned by Redmond Motor Co. Reference to the Oregon policy will show that its premium was based upon the payroll of the insured garages, with no consideration even of the number of vehicles owned (R. 106).

* See, e.g., *Vance on Insurance*, 3rd Ed., p. 96, *et seq.*

This is not said in any sense to negate Oregon's coverage for Suter if there had been no other insurance. But the actuarial basis for such incidental coverage to additional assureds necessarily assumes that most drivers will have their own primary insurance. This is shown by the very clause in question, which says that any additional assured who has other insurance will not be covered under the Oregon policy. If the Oregon were to undertake primary coverage for each person who might be driving one of the garage's automobiles, then obviously it would need some sort of a premium reflecting that exposure.

In short, the U. S. F. & G. had a premium to cover the particular risk of Suter's driving, and the Oregon did not. Surely as between the two companies, when the rights of the injured person will not be prejudiced, the primary risk should fall on the company which undertook to insure the particular driver as an individual.

IV.

The U. S. F. & G. owed the primary duty of defense to its own named insured.

As a part of its claim in this case, U. S. F. & G. seeks to be reimbursed for the sum of \$745.83 which it paid to its own attorneys for the defense of its own named insured, and the trial court so held. Appellant submits that such recovery is unjustified, even though it were to be decided that under the circum-

stances here the Oregon policy was primary as to the ultimate liability.

Each policy contains comparable provisions requiring each company to defend its insured even if such suit is groundless. The defense provision in the U. S. F. & G. policy is Insuring Agreement II (R. 16), and that in the Oregon policy is labelled "Additional Coverage" in the conditions (R. 94).

The duty of defense is a direct, contractual obligation, which neither company can avoid as to its own named insured. Plaintiff recognized this, and it is significant that it did not make any demand on or tender to the Oregon until long after the actions were filed, and after it had already appeared in the cases on behalf of its named insured.*

The Oregon has at all times been willing to defend its own named insureds, and did in fact defend Houk Motor Company in the Deschutes County case (Ex. 12, R. 118; Ex. 23, R. 140).

In *Continental Cas. Co. v. Curtis Pub. Co.*, 94 F. (2d) 710 (3rd Cir., 1938) the Continental had insured one Meadows, an employee of Curtis, with respect to his personal car, with an omnibus clause covering his employer, but excluding coverage if the addi-

* The record does not show just when the first action was filed in Deschutes County, but it must have been before July 8, 1950, because Brewster says in his letter of that date that he has been employed by General Adjustment Bureau to defend Suter (Ex. 23, R. 140). The General Adjustment Bureau represented U. S. F. & G. (R. 180). The first demand by U. S. F. & G. to Oregon was dated Sept. 5, 1950, and it referred only to the Marion County action (Ex. 11, R. 115). No demand was made with respect to the Deschutes County action until Nov. 7, 1950, which was less than two weeks prior to trial (Ex. 14, R. 125).

tional insured had other valid and collectible insurance. The American Co. had insured the employer, Curtis, against non-ownership liability, with a provision that its coverage was to be excess. The employee had an accident in the course of his business, resulting in lawsuits against both him and his employer. Continental undertook the defense of its insured, Meadows, but refused to defend Curtis. The American defended Curtis, its named insured, and paid the expenses of defense. Curtis then sought indemnity from Continental, including the cost of defense. The court held that Continental's policy was primary and American's was excess (the actual tort-feasor was Continental's named assured), but it denied reimbursement for the cost of defense on the ground that even though American's liability was secondary as to the injured persons, it owed a direct duty of defense to its own named insured.

Since Oregon had no contract with Suter, and any rights Suter might have under the Oregon policy are purely incidental, whereas U. S. F. & G. had a direct contractual obligation to defend Suter, appellant submits that U. S. F. & G. cannot shift its cost of defending its own named insured to Oregon, regardless of what rights the injured persons might have against Oregon.

Other Cases

As pointed out at the beginning of this Argument, the courts have had some difficulty with the problem of primary and excess coverage, and the cases are not uniform. See Annotation 122 A.L.R. 1204. We be-

lieve that the foregoing analysis will serve to reconcile most of the decisions. Some of the cases which are occasionally cited on the general question are not in point on the issue here.

For example in *Grasberger v. Liebert and Obert*, 335 Pa. 491, 6 A. (2d) 925 (1939), which is the subject of the above annotation, both the owner of the truck and the lessee were held to be in control of the truck and hence jointly liable to the injured person. This distinguishes it from the present case where the only tort liability was on the part of Suter, the named insured of U. S. F. & G.

In *Continental Cas. Co. v. Curtis Pub. Co.*, discussed *supra* on the question of obligation to defend, the driver was the actual tortfeasor and his employer was only vicariously liable. The holding that the employee's insurer was primarily responsible for the employer, as against the employer's own insurer, is therefore consistent with the cases cited under Point III, *supra*, and particularly the later decision of the same court in *American Auto v. Penn. Mutual, supra*.

The case of *Zurich Gen. Acc. & Liab. Ins. Co. v. Clamor*, 124 F. (2d) 717 (7th Cir., 1941) employs a line of reasoning that does not seem to be used in other cases. In that case the owner, Dottini, was insured with Zurich, under a policy issued March 11, 1939, with an omnibus clause that excluded coverage if the additional assured had other insurance. The driver, Clamor, had his own policy with the

Car & General which, by endorsement dated June 7, 1939, covered his use of other cars, provided that the latter coverage was excess only. The court argues that the risk under both policies attached at the same time, i.e. when Clamor drove Dottini's car with permission, and puts its decision on the ground that the driver's policy used more specific language in its exclusion than did the owner's and it therefore should enforce the exclusion in the driver's policy rather than that in the owner's. With respect to this decision we have these principal observations:

1. Although the court does not put its decision on that ground, the result was that the coverage which was *issued* first, was primary.

2. The court says that specific language is to be enforced, in preference to general, which is consistent with the cases cited *supra*, Point II.

3. In that case the nature of the coverage was identical, i.e. each policy was for automobile liability only—and neither policy had more general *coverage* than the other. In the absence of any difference in the overall scope of the policy, the “specific-general” rule was applied merely to the exclusionary language. This does not conflict with the cases which hold—as in the present case—that the policy of narrower scope should be responsible before the policy which covers a greater variety of risks.

CONCLUSION

In this field of law a practical approach to the problem is essential. The strict language of one or the other of the two policies must be sacrificed, and the question of which policy shall prevail requires a common sense solution.

This court judicially knows that the hazards of automobile accidents are always related directly to the particular driver, but are seldom, or only remotely, related to the car he happens to be driving. When one company has undertaken to insure the particular *driver*, no matter what car he is using, and another company has undertaken to insure the *vehicle*, no matter who is driving, the one which insured the particular driver should be primarily liable.

Such a result would follow in this case from the application of any one of the three rules mentioned above, and when all three lead to the same result, the conclusion seems inescapable.

Respectfully submitted,

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United States
COURT OF APPEALS
for the Ninth Circuit

OREGON AUTOMOBILE INSURANCE COMPANY,
Appellant,

vs.

UNITED STATES FIDELITY AND GUARANTY
COMPANY, a Corporation, BEULAH MORRIS and
WILLIAM MORRIS,
Appellees.

**BRIEF FOR APPELLEES BEULAH MORRIS
AND WILLIAM MORRIS**

Appeal from the United States District Court for the
District of Oregon.

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Appeal from the United States District Court for the
District of Oregon.

STATEMENT OF THE CASE

The statement of facts of the case and controversy as set forth in the appellant's Brief on pages 2 to 7 is essentially correct. The controversy herein stems from an accident which took place on the 15th day of October, 1949, when Raymond Suter was driving an automo-

bile for the purpose of demonstration, the automobile being a Mercury, and it was at that time owned by the Redmond Motor Company and/or Houk Motor Company. This car collided with an automobile owned and operated by Mr. William Morris, one of the appellees herein. The Mercury automobile which Suter was driving was covered by a Liability Insurance Policy issued on the first day of October, 1949, by the Oregon Automobile Insurance Company, the appellant herein (and hereinafter referred to as Oregon); said policy having been issued to the Houk Motor Company, the Redmond Motor Company and the Redmond Tractor Company. This policy is set forth on page 93 through 106 in the transcript of record herein (R. 93 through 106).

Suter at this time owned a Plymouth automobile, and for the purpose of insuring the operation of said automobile, had purchased from the United States Fidelity and Guaranty Company (an appellee herein referred to hereinafter as U. S. F. & G.) a policy of liability insurance with himself as the named insured. The Plymouth automobile was not involved in the accident herein. This policy is found in the transcript of record on pages 15 to 20 (R. 15 through 20). Appellee Beulah Morris brought an action at law for personal injuries in the County of Deschutes, Oregon, Clerk's file No. 7780, in which she named Raymond Suter, Houk Motor Company, a corporation, and James Stuchlik as defendants. Thereafter the 20th day of November, 1950, said case was tried in Deschutes County resulting in a verdict and judgment against defendant Raymond Suter in the sum of \$7,360.00.

Prior to the trial of this case, there was correspondence between Oregon and U. S. F. & G. as to which company was liable for the defense of Suter in the Deschutes County action. On November 9, 1950, the attorneys for Oregon, in a letter to the attorneys for U. S. F. & G., denied any and all liability under its policy with respect to Suter (R. 127-8).

On the 17th of November, attorneys for Oregon, in a letter to Suter specifically denied that their policy covered Suter, and refused to accept any responsibility in defending Suter or in satisfying any judgment which might be recovered against Suter (R. 131-32).

Subsequently, appellee U. S. F. & G. instituted the present action, a declaratory judgment suit in the District Court of the United States of the District of Oregon. In this case a judgment was rendered by the trial court from which judgment, Oregon, as appellant, has now brought the case to this court.

It will be noted that, although the appellant specified twenty three alleged errors of the trial court, pages 7 to 14 of the Appellant's Brief, appellant does admit that the crucial question involved herein is whether the policy of insurance issued by itself is primary or excess as to the policy of insurance issued by U. S. F. & G., page 70, Appellant's Brief.

ARGUMENT

1.

The Trial Court was entirely correct in finding that the policy of insurance issued by Oregon was primary

coverage, hence Oregon is obligated to satisfy the judgment as entered by the trial court.

After a careful inspection of the briefs for both appellant and appellee, U. S. F. & G., these appellees feel that it would be a burden on the court to set out fully the legal position taken by Appellees Morris. The appellees have no quarrel with the findings of the trial court to the effect that the Oregon coverage is primary and the U. S. F. & G. coverage is excess.

These appellees have carefully considered the brief of appellee U. S. F. & G. and wish at this time to adopt it in its entirety, both for the purpose of answering the arguments of the appellant and for the purpose of setting forth affirmative reasons why the Oregon coverage is in fact primary. Appellees Morris are in complete agreement with the propositions of law advanced by appellee U. S. F. & G.

2.

These appellees contend that specifications of errors Nos. 5 and 11 (R. 79, 189, 83, 191) (and appellant's brief pages 9 and 11) are not well taken.

Michigan Millers Mutual Fire Insurance Company v. Grange Oil Company of Linn and Benton Counties, 175 F. (2d) 544 (9 C.C.A. 1949).

Horwitz v. New York Life Insurance Company, 80 F. (2d) 295 (9 C.C.A., 1935).

Oregon Compiled Laws Annotated, Section 101-134.

It will be noted that nowhere in the argument of appellant is there specific support for specification of

errors Nos. 5 and 11 which specifications allege that it was error for the trial court to find in favor of appellee Beulah Morris in the sum of \$250.00 attorneys fees for prosecuting the declaratory judgment suit. These appellees assume it is appellant's contention that in the event the U. S. F. & G. coverage is found to be primary, Oregon will be absolved of any liability to Morris on account of attorneys fees.

An allowance of attorneys fees in the Trial Court was made on the basis of petition for attorneys fees entered by attorney for appellees Morris (R. 64), said petition having been submitted under the provisions of Oregon Compiled Laws Annotated, section 101-134. A finding of fact was entered by the Trial Judge on the 19th of July, 1951, (R. 79) whereby the appellee Beulah Morris was found to be entitled to recover from the defendant Oregon the sum of \$250.00 attorneys fees for representation in the declaratory judgment suit by means of which she sought to enforce payment of her judgment which both insurers had refused to pay. Based upon said finding of fact, there was included in the judgment decree entered herein on the 19th of July, 1951, (R. 83) an allowance of attorneys fees of \$250.00 for Beulah Morris.

It was held in the case of *Horwitz v. New York Life Insurance Company*, 80 F. (2d) 295 (9 C.C.A., 1935) that it was proper for the trial court to allow attorneys fees in an action arising out of an insurance policy, said attorneys fees to be assessed against the unsuccessful insurance company litigant.

Judge Denman said in the Horwitz case, page 302:

"Under the Oregon law the insured is entitled to his attorneys' fees to be fixed in amount by the court. Oregon Code § 46-134, as amended by Laws 1931, p. 620.* The rules of the District Court adopt the law of Oregon with reference to court costs. Such a provision of the Oregon law, by way of costs, is an incident of the remedy and is controlled by the law of the forum. Supreme Lodge, Knights of Pythias, v. Meyer, 198, U.S. 508, 517, 25 S. Ct. 754, 49 L.Ed. 1146; Fidelity Mutual Life Ass'n v. Mettler, 185 U.S. 308, 322, 22 S. Ct. 662, 46 L. Ed. 922. The insured is entitled to a decree for an amount of attorneys' fees to be fixed by this court which has finally tried the issued."

It will be noted that attorney for appellant stated (R. 166) to the trial court that the appellant did not seriously oppose the allowance of some attorneys fees to the attorneys for Beulah Morris. At the time of making the argument attorney for appellant was primarily concerned with reasonableness of the amount of the attorneys fees rather than the awarding of some attorneys fees.

Appellant's specifications of error Nos. 5 and 11 do not attack the reasonableness of the allowance, but the validity of the allowance.

We submit that the trial court was empowered to find for appellee Morris on the question, and that exceptions to such finding are not well taken.

In *Michigan Millers Mutual Fire Insurance Company v. Grange Oil Company of Linn and Benton Coun-*

*Now codified as O.C.L.A. § 101-134.

ties, 175 Federal (2d) 544 (9th Circuit, 1949) this court had before it the question of allowance of attorneys fees on appeal. In that case the Court held that in the light of the *Horwitz* case above cited, and under O.C.L.A. 101-134, not only was the party maintaining an action arising from the policy entitled to reasonable attorneys fees in the trial court, but that if said allowance was made by the trial court, the appellate court would also award reasonable attorneys fees upon affirmation of the judgment.

CONCLUSION

We agree with appellant that in this field of law a practical approach to the problem is essential. These appellees have at all times and in good faith been actual litigants in this declaratory judgment suit and interested parties and have properly moved the trial court for reasonable attorneys fees under the applicable statute and submit to this appellate court that on the basis of the judgment entered herein these appellees are entitled to the attorneys fees as allowed by the trial court.

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United States
Court of Appeals
For the Ninth Circuit

OREGON AUTOMOBILE INSURANCE COMPANY,
Appellant,

vs.

UNITED STATES FIDELITY AND GUARANTY
COMPANY, a Corporation, BEULAH MORRIS
and WILLIAM MORRIS,
Appellees.

Appellant's Reply Brief

Appeal from the United States District Court for
the District of Oregon

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REPLY TO BRIEF OF APPELLEES MORRIS

Appellees Beulah and William Morris have filed a brief in this court seeking to sustain the trial court's award to them of attorneys' fees against appellant Oregon Automobile Insurance Company. They also impliedly suggest (p. 7) that they desire attorneys' fees on this appeal.

.

In our opening brief (p. 6) we pointed out that regardless of the outcome of this case, the rights of the Morrises are fully protected. No one denies that their claims will be paid under one or the other of the two policies. The only question is which company should pay, and that question is purely between the two companies. The Morrises need not be concerned over which company is ultimately held to be liable, and they need not take sides in this dispute.

In their answer (R. 43) as well as in the Pre-Trial Order (R. 54) the Morrises asserted their claim against *both* companies. In the answer filed by Oregon (R. 30-31), in the Pre-Trial Order (R. 55-56), and also at the trial of this case (R. 91), the Oregon expressly admitted that after the U. S. F. & G. policy limits have been paid, then Oregon will be obligated to pay the balance. Oregon has never denied coverage except on the sole ground that the U. S. F. & G. policy is applicable; so if the U. S. F. & G. policy were held not to be applicable, then there would be no further dispute between Oregon and the Morrises.

We therefore suggest that there was no real need for the Morrises to participate, by counsel, either in the trial court or on this appeal. Presumably the only reason the Morrises were joined as parties was so that whatever determination is made with respect to the policies will be an end of the matter.

Certainly the Morrisises have nothing to lose by this proceeding, no matter which way it is decided.

There is some doubt whether a counterclaim against both companies in a declaratory judgment action, where the only dispute is between the companies, is an "action brought upon a policy of insurance" within the meaning of O.C.L.A., Sec. 101-134. However, the Oregon does not raise that question, and at the time of trial we expressly stated that if the Oregon policy were held to be primary, we would not oppose the allowance of some attorneys' fees to the Morrisises (R. 152, 166, 175). We did think the amount originally claimed (which was on a contingency basis, R. 159) was excessive, and we argued that question only (R. 166-7).

We do not now dispute the reasonableness of the fee allowed by the trial court, and our only objection to the judgment for attorneys' fees is that it was awarded against Oregon rather than against U. S. F. & G. We now reiterate that if it be ultimately held that the Oregon policy is primary, we do not object to the allowance of attorneys' fees which was made by the trial court. Under these circumstances we submit that any further award of attorneys' fees on this appeal would be unjustified. We do not, of course, waive our position that the award of attorneys' fees in the trial court should have been against U. S. F. & G., rather than against Oregon; and this brings us back to the real question of which policy is primary.

REPLY TO BRIEF OF APPELLEE U. S. F. & G.

In the brief filed by Appellee, U. S. F. & G., that company professes to reject all of the rules outlined in our opening brief by which the courts have resolved the question presented here, and it offers in lieu thereof only the following:

“* * * the only rule that can be followed in determining respective responsibility of the insurance carriers is one of construction of the policies, separately and in connection with each other” (Appellee’s Br., p. 26).

While the foregoing statement is no doubt unobjectionable as a general platitude, it unfortunately gives no help in particular cases. The problem in this type of case arises only because the two policies are mutually contradictory, and the language of both cannot be given effect. To enforce the “other insurance” clause in either policy is automatically to cancel the corresponding clause in the other policy. It is because the two cannot be harmonized that the courts have turned to such factors as (1) the priority in date of issuance, (2) the general or specific nature of the coverage, and (3) the question of whose named insured is the primary tortfeasor.

Such considerations are not outside the scope of the policies, but are merely the methods by which the courts have interpreted the policies under the

facts of particular cases. Appellee does not point to any language in its policy which entitles its "other insurance" clause to any greater weight than that of Appellant, and in the absence of determinative language the question can only be decided by reference to matters such as those we suggest.

The Language of the Policies

If any distinction can be drawn between the "other insurance" clauses in the two policies, we submit that the Oregon policy is actually more emphatic in its exclusion than that of U. S. F. & G. While the U. S. F. & G. policy says that it "shall be *excess* insurance over any other valid and collectible insurance available to the Insured", the Oregon policy says that "this company *will not be liable* if any other person, firm or corporation indemnified hereunder is covered by valid and collectible insurance * * *".

In other words, the U. S. F. & G. policy does not absolutely exclude coverage if there is other insurance, but it merely seeks to be excess; while the Oregon policy absolutely excludes coverage so long as the other policy exists. In effect, as we pointed out in our opening brief, the two clauses may have the same result, because when the U. S. F. & G. limits are exhausted it ceases to be valid and collectible, and the Oregon policy then comes into play. So the practical operation of the Oregon exclusion in

this case may be the same as if it had said *excess only*. For purposes of interpretation, however, if Appellee wishes to stand solely on the language of the two policies, the Oregon exclusion is stronger than that of U. S. F. & G., so it should be enforced in preference to that of U. S. F. & G.

In discussing the U. S. F. & G. policy, Appellee says “* * * a Plymouth *automobile* owned by Suter was insured by the United States Fidelity and Guaranty Company * * *” and “the fact of *its* insurance, however, has given rise to this controversy” (Appellee’s Brief, p. 3).

If by such statements Appellee seeks to give the impression that it insured only the Plymouth automobile, and not Suter, then such statements are misleading. On the contrary, the U. S. F. & G. policy insures “Ray E. Suter and/or Lela Suter”, and the insuring agreement is “To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay * * * etc.” In its “Use of Other Automobiles” clause the U. S. F. & G. agreed that “such insurance as is afforded by this policy with respect to said automobile [i.e., the Plymouth] applies with respect to any other automobile * * * etc.” (Ex. 1, R. 15-16).

Thus the U. S. F. & G. policy insured Suter, whether driving his own or any other automobile, and so far as this case is concerned it cannot be said that its coverage with respect to the Plymouth

was of any stronger effect than its coverage for any other vehicle which Suter might be driving. Of course, the "other insurance" clause modifies the "use of other automobiles" clause, but Appellee cannot lift itself by its own bootstraps by assuming that its coverage is basically for the Plymouth and only incidentally for Suter. The exact opposite is true—that its coverage is basically for Suter, regardless of what vehicle he is using.

By the same token the Oregon policy is basically for the purpose of insuring the Redmond Motor Company, and such coverage as it extends to other persons is only because those persons happen to be driving cars owned by the Redmond Motor Company. With the Oregon policy the coverage follows the vehicle, to include any permissive driver; whereas with the U. S. F. & G. policy the coverage follows Suter, to include any car he happens to be driving. Therefore, as we stated in our opening brief, under the facts of this case the U. S. F. & G. policy is *driver* insurance, while the Oregon policy is *vehicle* insurance.

The validity of our contention that *driver* insurance is primary and *vehicle* insurance is secondary (Appellant's Brief, pp. 31-2, 37) is apparently recognized by Appellee, for it seeks to twist its policy so as to give itself the benefit of that rule. Thus on page 15 of its brief, Appellee states with reference to the cited cases that:

“* * * in each case the insurance company having coverage of the person responsible for the operation of the vehicle involved in the accident was held to have primary coverage.”

That is exactly our position in this case. Here, Suter was responsible for the operation of the vehicle involved, and the Redmond Motor Company was not. The U. S. F. & G. had insured Suter, whereas the Oregon had insured Redmond Motor Company. We submit that for this reason alone, apart from the other factors involved, the U. S. F. & G. policy was primary.

Appellee suggests in its brief (p. 16) that there is doubt whether the U. S. F. & G. policy applies at all, because of an exclusion with respect to “any accident arising out of the operation of an automobile repair shop, public garage, sales agency, * * * etc.” There is not the slightest evidence in this case that the accident in question arose out of the operation of a garage or similar agency. The stipulated facts are merely:

“That on or about October 15, 1949, the defendant Raymond Suter was driving and operating a certain Mercury automobile, bearing dealer’s license A75, belonging to the defendant Redmond Motor Company, with the knowledge and consent of the Redmond Motor Company. At said time a collision occurred between the vehicle Raymond Suter was operating and an automobile in which the defendant Beulah

Morris was a passenger, as a result of which said Beulah Morris received certain personal injuries" (R. 50).

There is no evidence in the record whatsoever to support Appellee's assertion (Appellee's Brief, p. 2) that Suter had obtained the car for demonstration purposes, or that he was considering purchasing it. Furthermore, even if there were such evidence, that would not make the accident one *arising out of the operation* of a garage or similar agency.

Computation of Insurance Premiums

In its brief (p. 26) Appellee makes the following assertion, in support of its contention that *vehicle* coverage should be primary and *driver* coverage secondary:

"* * * It is a known fact that many different types of vehicles are insured, namely, public or private, business or pleasure, large or small, old or new, and in good or bad condition. The result is that insurance carriers customarily consider the above categories in fixing the premium * * *."

At the time of the hearing in the trial court, the Oregon offered evidence relating to the manner of computing liability insurance premiums, which evidence tended to prove the contrary of Appellee's contention above quoted (R. 169-174). The evidence

was offered pursuant to a proposed amendment to the Pre-Trial Order, which was as follows:

“The defendants Houk Motor Company, Redmond Motor Company, and Oregon Automobile Insurance Company contend that in the business of automobile liability insurance generally and as carried on by the defendant Oregon Automobile Insurance Company in particular, when separate policies exist covering the driver and the car, the insurance on the driver is considered primary and that on the car is considered secondary, and in computing rates for liability insurance such rates are based on the risks arising from the particular driver and have no relation to the particular kind of car being driven” (R. 112-113).

At that time Appellee objected to the amendment, and the court denied the amendment (R. 113), although leave to amend the Pre-Trial Order in certain respects had previously been expressly reserved (R. 107). The trial court then rejected the offer of proof which was made to support the proposed amendment (R. 174).

Appellee has itself now made an issue with respect to the manner of fixing insurance premiums, and we therefore submit that the court may consider our offer of proof on that subject. Since our evidence was the only proof on that issue, it stands undisputed. Under Rule 15, F.R.C.P., “when issues

not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

The evidence to which we refer (after qualifying the witness) showed that classifications for liability rates are established by statistical bureaus from the accumulation of experience figures from various insurance companies; that the National Bureau of Casualty Underwriters issues a manual of rate classifications for all types of liability insurance; that Appellant, Oregon Automobile Insurance Company, follows generally the classifications so established*; that the factors entering into computation of an automobile liability rate are "the territory or location, the individual, his age, occupation, perhaps, or the use made of the automobile"; and that the particular kind of automobile he is driving has no bearing (R. 171). The evidence further showed that prior to March, 1940, the kind of automobile was a factor, but that about that time there was a complete change, and since then the kind of automobile has been of no importance (R. 171-173).

With respect to a garage liability policy, such as the Oregon policy in this case, it was testified that the premium was computed on the basis of the insured's payroll, without consideration of the

*The use of insurance rating bureaus is specifically authorized by statute in Oregon. Chapters 337 and 338, Or. Laws, 1947.

kind or number of vehicles involved (R. 173-4). The basic garage liability features of the policy only cover the garage itself and its employees, and when an additional-interests clause is added, such as in this case, the premium for the coverage for permissive drivers is merely a percentage of the basic payroll premium (R. 173-4).

Thus the evidence shows that during the times involved in this case insurance carriers *did not* customarily consider the types of vehicles in fixing premiums, as Appellee asserts, but on the contrary, the factors affecting premiums related entirely to the risks pertaining to the particular driver.

In fact, Appellee's own policy shows that for rating purposes certain classifications are established which depend upon (1) the type of driving involved, (2) the age of the driver, and (3) the probable yearly mileage (R. 19-20). Nothing is said in Appellee's own classification about the type of vehicle to be driven. Thus Appellee's assertion about premium computation is refuted not only by the evidence in the record, but by its own policy.

Since it is recognized in the trade (as common experience would also indicate) that liability hazards are dependent upon factors personal to the driver, and not related to the particular automobile, we submit that the *driver's* coverage should be primary and the *vehicle* coverage should be secondary.

Appellee's Cases

As we pointed out in our opening brief, the courts have had some difficulty with this problem, and the cases are not all in agreement. However, Appellee has cited only four cases in addition to those discussed in our opening brief, and of these not one can fairly be said to be contrary to our position here.

In *Great American Indemnity Co. v. McMenamin*, 134 S.W. (2d) 734 (Tex. Civ. App., 1939), one Lowe was an employee of Paramount, and he caused an accident while on business of his employer, rendering Paramount liable to the injured person. Judgment in the tort action was returned only against Paramount, because Lowe was outside the jurisdiction. Lowe had been driving his own personal car, and he carried his own insurance with the Great American. His policy with Great American had an omnibus clause protecting those legally responsible for the use of his automobile, but excluding coverage if such additional insured had other valid and collectible insurance. Paramount itself had a non-ownership policy with the Employer's Liability Company, protecting it against liability arising out of the use of any automobile in its business. Its policy contained a clause making it excess only, if there was other insurance on behalf of any one other than its named insured under which Paramount would be entitled to protection.

The court held that the Great American policy was primary and the Employer's policy was excess.

This is not contrary to our position, but in fact supports it. Paramount was not the primary tortfeasor, but was only vicariously liable because of the master and servant relationship. Since the primary tort-feasor—Lowe—was the named insured in the Great American policy, the holding that such policy was primary was in line with the cases cited under Point III of our opening brief (pp. 28-32). Furthermore, Lowe was driving his own car at the time of the accident, and Great American would have been liable to pay the tort judgment on behalf of Lowe himself, except for the fact that Lowe was outside the jurisdiction.

The case of *Travelers Indemnity Co. v. State Automobile Ins. Co.*, 67 Ohio App. 457, 37 N.E. (2d) 198 (1941) (erroneously cited by Appellee as 34 N.E. 198), can be harmonized with the cases cited in our opening brief because there the owner's policy, which was held to be primary, was issued on May 18, 1938, and the driver's policy, which was held to be excess, was not issued until September 14, 1938. As we have previously pointed out (Point I, Appellant's Brief, pp. 23-25) a number of cases hold the policy of prior date to be primary, and in the present case the U. S. F. & G. policy is earlier in date. The opinion in that case is unsatisfactory, however, for it does not really analyze the question and does not

state the reasoning by which the court arrived at its decision.

The case of *State Farm Mutual v. Hall*, 292 Ky. 22, 165 S.W. (2d) 838 (1942) (erroneously cited by Appellee as 165 S.W. 838), can likewise be explained on the ground that the owner's policy was issued on October 26, 1938, and the rider on the driver's policy, which covered his use of other automobiles, was not issued until May 29, 1939. However, that case does not decide the question presented here, for the owner's policy had not been pleaded, and it does not appear what, if any, provision it contained dealing with other insurance. In sending the case back for further proceedings, the court pointed out that it could not pass on the merits as between the two companies until the owner's policy was pleaded.

Likewise, the case of *Speier v. Ayling*, 158 Pa. Super. 404, 45 A. (2d) 385 (1946), does not decide the present question, because in that case only one of the policies had any excess clause at all. Ayling was driving Speier's automobile, and Speier was riding in the car. An accident occurred by reason of Ayling's negligence, and Speier recovered judgment against Ayling. Ayling (the driver) carried insurance with Allstate, which covered him while driving any automobile, and Speier (the owner) had a policy with Threshermen, which covered permissive drivers. Both policies provided that they

would pro-rate with other insurance, but the Allstate policy provided that as to Ayling's use of other cars, its coverage was excess only. The Threshermen policy *did not have an excess insurance clause* (45 A. (2d) 388, n. 6). The court held that the Allstate policy was liable, but the decision has no bearing on a situation where, as here, *both* policies have excess clauses.

The other cases cited or relied on by Appellee have already been discussed in our opening brief, and it would be an imposition for us to repeat our analysis of those cases. We would point out, however, that the quotation from Appleman (Appellee's Brief, p. 19) is a good illustration of the circular reasoning condemned by the Court of Appeals for the Second Circuit in the *Kearns* case (118 F. (2d) 33, cert. den. 313 U.S. 579). What Appleman says, in effect, is that the other insurance clause in the primary policy is not given effect because the insurance under the excess policy is not collectible, so long as the primary policy exists. This merely begs the question, for it assumes that one or the other is primary to start with. No reason is offered—and Appellee suggests none in this case—why the other insurance clause in the owner's policy is not entitled to as much weight as the other insurance clause in the driver's policy.

In order to avoid such fallacious reasoning it is necessary to look to the underlying purpose of the

two types of insurance—i.e., driver coverage and vehicle coverage. The U. S. F. & G. policy was intended to protect its named assured, Suter, no matter what car he was driving, and its premium was computed on the basis of *his* driving risks—his age, occupation, residence, and the amount and kind of driving he would likely be doing. On the other hand, the Oregon policy was intended to protect the Redmond Motor Co., and the coverage it extended to permissive drivers such as Suter was purely incidental to its main purpose. The premium for the Oregon policy was computed on the basis of the assured's payroll. Whereas the assured's payroll, as an indication of the size and scope of its business, would have an actuarial bearing on the risks arising from the assured's own operations, it would obviously not reflect any risk arising from Suter's driving ability or accident history. Suter was totally unknown to the Oregon, but he was the very person with whom U. S. F. & G. had directly contracted.

Thus the practical considerations of the insurance business, as well as the rationale of the decided cases, point to the U. S. F. & G. policy as the primary coverage. This does not "nullify the rule of respondeat superior" (Appellant's Brief, p. 18) nor does it "throw out of the window all coverage of corporations" (Appellant's Brief, p. 26). The question only arises where both policies are otherwise ap-

plicable, and to hold that the tort feason's policy is primary does not invalidate the other, but merely postpones it until the tort feason's own policy has first been used.

CONCLUSION

We therefore submit that the trial court erred in holding the Oregon policy to be primary and the U. S. F. & G. policy to be excess, and that this court should reverse that determination and hold the U. S. F. & G. policy to be primary and the Oregon policy to be excess. As far as the Morrises are concerned, their rights will follow automatically from whatever determination is made between the two companies.

Respectfully submitted,

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No. 13094

United States
Court of Appeals
For the Ninth Circuit.

ANTONE PAGLIERO and ARTHUR PAG-
LIERO,

Appellants,

vs.

WALLACE CHINA CO., LTD., a Corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

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PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Appellee.

In the United States District Court, Northern
District of California, Southern Division

No. 30595

WALLACE CHINA CO., LTD.,

Plaintiff,

vs.

ANTONE PAGLIERO, ARTHUR PAGLIERO,
and JOHN PAGLIERO, Doing Business as
TECHNICAL PORCELAIN & CHINA-
WARE CO. and ANTONE PAGLIERO,
MARY JEAN PAGLIERO and DELINA
PAGLIERO, Doing Business as PYRAMID
ALLOY MANUFACTURING CO.,

Defendants.

COMPLAINT FOR UNFAIR COMPETITION AND TRADE-MARK INFRINGEMENT

Comes Now the plaintiff with its complaint and
alleges as follows:

1. Plaintiff Wallace China Co., Ltd., is a corporation organized and existing under and by virtue of the laws of the State of California and has an established place of business at Huntington Park, Vernon, County of Los Angeles, California, adjacent the city of Los Angeles.

2. Defendants Antone Pagliero, Arthur Pagliero and John Pagliero are residents of the Northern District of California and general partners doing business as Technical Porcelain & Chinaware

Co. with an established office and plant at 6416 Manila Avenue, El Cerrito, Contra Costa County, State of California. Plaintiff alleges, on information and belief, that defendants Antone Pagliero, Mary Jean Pagliero and Delina Pagliero are partners doing business at the same location under the name and style Pyramid Alloy Manufacturing Co.

3. This is an action for infringement of trademarks and for unfair competition and the amount in controversy exceeds Three Thousand Dollars (\$3,000.00); this Court has jurisdiction under the provisions of the Lanham Trade-Mark Act of July 5, 1946, 15 U.S.C.A. §§1051-1127 and 28 U.S.C.A. §§1337 and 1338.

4. For over twenty years last past, plaintiff corporation has been and still is engaged in the manufacture and sale of vitrified hotel china throughout the western part of the United States of America and the territory of Hawaii; plaintiff alleges that about forty per cent of its products are shipped in interstate commerce, and that it has over fifty established dealers for its vitrified hotel china throughout California and in other states, including Oregon, Washington, Utah, Oklahoma, Kansas, Louisiana, Georgia and Texas.

5. Plaintiff corporation, by the exercise of much effort and judgment and the expenditure of large sums of money for technical assistance, supervision, equipment and materials, and the exercise of great care in the preparation of clays and ingredients entering into the manufacture of vitrified hotel

china, the selection and use of specialized equipment for forming and burning the china, the compounding of glazes, and the inspection and packaging of the china, has manufactured and extensively sold vitrified china of high durability and quality to many dealers and purchasers. Plaintiff corporation has employed artists to create and design new, unique and original patterns and developed distinctive patterns and methods of reproducing them on china, said patterns imparting attractiveness, desirability and sales appeal to the china manufactured by plaintiff.

6. Plaintiff alleges that it used and is using distinctive trade names or trade-marks to indicate the nature, quality, and source of its china; that among trade names so appropriated and used by plaintiff are "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia"; that plaintiff uses the said trade names in connection with its china bearing distinctive patterns and applies said trade names to containers in which said china is shipped and sold (in interstate and intrastate commerce); that said trade names have been extensively used and are used in catalogs and advertising matter published by plaintiff and its dealers.

7. Plaintiff alleges that by reason of the expenditure of its effort, time and money and the high quality and durability of plaintiff's china, and the distinctive and attractive appearance thereof, due to the original patterns employed and the wide distribution of the china, plaintiff's china has become

popular and has engendered a large and valuable good will and a high reputation; that the appearance of plaintiff's china, by reason of the attractive and distinctive patterns, is recognized by the purchasing trade as representing high quality china originating with plaintiff. Plaintiff has expended much time and effort through its salesmen and representatives and by advertising and exhibiting the china bearing said distinctive patterns in building up and acquiring a demand for said china and a good will therein. That Exhibit 1, attached hereto, is a pattern transfer originated by plaintiff and known by the trade name "Shadowleaf," said pattern being used by plaintiff on its china.

8. Plaintiff alleges that the various trade names and each of them appropriated and used by plaintiff have acquired and represent a large and valuable good will and high reputation and are associated with and recognized by the purchasing trade as representing china originating with plaintiff and bearing said distinctive patterns; that plaintiff's customers and the purchasing public ask for china by trade name and expect to get china manufactured by plaintiff and bearing plaintiff's designs.

9. Plaintiff alleges that defendants have engaged in a premeditated, perfidious and willful course of conduct designed to destroy the good will, reputation and business of plaintiff and its trade-marks and patterns by copying said distinctive patterns originated and popularized by plaintiff and by using the trade names first appropriated and used by

plaintiff. Plaintiff alleges that defendants have conspired with the engraver (Garnier Engraving Co. of Los Angeles, California), formerly taught and trained by plaintiff in the preparation of rollers for the production of pattern transfers, and have willfully, deliberately and surreptitiously had such engraver make rollers for and on behalf of defendants, which rollers are a copy of plaintiff's rollers and defendants have used and are now using such copied rollers in making copies of plaintiff's patterns; that Exhibit 2 attached hereto and made a part of this verified complaint is a pattern transfer made by defendants in slavish imitation of plaintiff's pattern Exhibit 1, by the copied rollers and used by defendants upon china sold by defendants in interstate and intrastate commerce and in competition with plaintiff; that defendants have copied various of plaintiff's original patterns, including the patterns known by trade names "Shadowleaf," "Tweed," "Hibiscus," and "Magnolia," have applied said copied patterns to china and have sold and are selling said china to the great damage and injury to plaintiff and its reputation, good will and business. Plaintiff alleges that the china sold by defendants bears a willful, deceptive copy of plaintiff's original patterns and is a fraud upon the purchasing public, and alleges that Exhibit 3 attached hereto is a plate manufactured and sold by plaintiff under the name "Shadowleaf" and that Exhibit 4 attached hereto is a plate manufactured and sold by defendants under the name "Shadowleaf."

10. Plaintiff alleges that defendants have been and are selling, offering for sale and advertising china bearing copies of plaintiff's distinctive patterns under plaintiff's trade names in California and elsewhere. Plaintiff alleges that Exhibits 7a and 7b attached hereto are copies of price lists distributed by defendants offering china under plaintiff's trade names "Tweed," "Shadowleaf" and "Hibiscus." Plaintiff further alleges that as a part of their plan to appropriate the good will and business of plaintiff and to deceive the purchasers into purchasing defendants' china instead of plaintiff's china, defendants have copied the color, marking and arrangement of plaintiff's shipping cartons; that Exhibit 5 appended hereto is a photostat of one of plaintiff's cartons used in shipping "Shadowleaf" china; that Exhibit 6 attached hereto is a photostat of one of defendants' cartons used in shipping the imitation. Plaintiff alleges that by the acts herein complained of defendants deceive the public with respect to the nature, quality and source of the china and damage the plaintiff in its good will, reputation and business; that the sale by defendants of china bearing the copied patterns is a direct infringement of plaintiff's rights and the good will attached thereto and constitute unjust enrichment by defendants. That the acts of defendants complained of herein are related to and constitute a part of defendants' acts in infringing upon plaintiff's trade names and constitute unfair competition and an aggravation of damages to plaintiff.

11. Plaintiff alleges that the sale of china by defendants under the trade names first appropriated and used by plaintiff is calculated to deceive the public and constitutes a palming off of defendants' china as china of plaintiff, and by such sales defendants are appropriating to themselves the good will belonging to plaintiff; that by reason of the acts herein complained of defendants have made and are making it possible for defendants' dealers to commit a fraud upon the purchasing public.

12. All of the aforesaid acts of defendants are contrary to plaintiff's rights and contrary to commercial good faith and to the normal and honorable development of business activities. Defendants have been notified to cease such acts but continue to copy said patterns and to sell china under plaintiff's trade names and will continue to sell said infringing china and perform acts of unfair competition to the irreparable damage of plaintiff unless restrained by this Court. Plaintiff has already been damaged in an amount in excess of Twenty Thousand Dollars (\$20,000.00) and will continue to be damaged in an increasing amount from day to day unless defendants are enjoined and unless immediately restrained, defendants will completely and irreparably destroy and nullify plaintiff's good will and values owned by plaintiff.

Wherefore, plaintiff prays:

(1) That defendants and each of them, their agents, representatives, attorneys, servants and those acting in privity and concert with them, be

enjoined during the pendency of this action and permanently from infringing the rights of plaintiff in any manner and from making or causing to be made, selling, offering for sale, advertising, exhibiting, marketing or otherwise disposing of china bearing patterns deceptively similar to those originated by plaintiff or referred to or identified by plaintiff's trade names.

(2) That defendants and each of them be required to pay to plaintiff such damages as plaintiff has sustained in consequence of said unfair trade practices, unfair competition and trade-mark infringement, and to account for all gains, profits and advantages derived by defendants by the said practices and that such damages be trebled by reason of the willful, deliberate and wanton character of said acts of unfair competition.

(3) That defendants and each of them pay to plaintiff the cost of this action and reasonable attorneys' fees to be allowed to plaintiff by the Court.

(4) For such other and further relief as to this Court seems just and proper.

WALLACE CHINA CO., LTD.

By /s/ KENNETH O. WOOD,
President.

/s/ C. A. MIKETTA,

NAYLOR & LASSAGNE,

By /s/ JAS. M. NAYLOR,
Attorneys for Plaintiff.

State of California,
County of Los Angeles—ss.

Kenneth O. Wood, being first duly sworn, states that he is president of Wallace China Co., Ltd., the corporation named as plaintiff in the above action; that he has read the foregoing complaint; that the same and every allegation thereof is true and correct to his own knowledge except as to those allegations made upon information and belief, and as to those allegations he believes them to be true.

/s/ KENNETH O. WOOD.

Subscribed and sworn to before me this 25th day of May, 1951.

[Seal] /s/ MILDRED K. BADGER,
Notary Public in and for the County and State
above named.

My Commission Expires Mar. 2, 1952.



EXHIBIT 1







FROM
WALLACE CHINA CO. LTD.
HUNTINGTON PARK, CALIF

124
PKG. SLIP
NO.

01961

3 DOZ. 4 1/2 Cream

— DOZ. MUGS —

— DOZ. CUPS —

DEC. *Shadashief* - E23-1B



From **TEPCO CHINA CO.**
EL CERRITO CALIFORNIA

CUST. ORDER
NO.

PKG. SLIP
NO.

485.
3 DOZ. Eng. Med. Creams

~~DOZ~~ MUGS 85.

~~DOZ~~ CUPS

DEC. Shadow Tray Br...

Photos: Lardascope 5-0960 and 5-3051

TECHNICAL PORCELAIN & CHINA WARE CO.

ELSTER'S

El Cerro, California

BRANCH OFFICE AND WAREHOUSE
223 South Los Angeles Street
LOS ANGELES, CALIFORNIA
Tucker 2764

DISCOUNT SHEET

Effective December 1, 1947

SUBJECT TO CHANGE WITHOUT NOTICE

All purchases from El Cerro Plant and Main Office 6416 Manila Street El Cerro, Calif., will bear the following discount rates on Dec. 1, 1947 List Prices F.O.B. Plant.

Terms: 1% 10 Days; 30 Days Net; Interest 8% on Overdue Bal.

RED BAND		TAN BODY	
Plain Sunflow	White List Plus 10% 16%	Plain White	White List Plus 16%
Sunflow 61	Dec. List Less 30% 24%	L100 Rhinels	Dec. List Less 34%
Sunflow 62	Dec. List Less 14% 7%	L101 Marigolds	Dec. List Less 34%
Sunflow 63	Dec. List Less 14% 7%	L104 Green Band & Line	Dec. List Less 24-7%
Sunflow 64	Dec. List Less 14% 7%	L106 Blue Band & Line	Dec. List Less 24%
Sunflow 65	Dec. List Less 9% 7%	L107 Blue Band	Dec. List Less 24%
Sunflow 67	Dec. List Less 14% 7%	L108 Red Band	Dec. List Less 24%
Sunflow 68	Dec. List Less 14% 7%	L50	Dec. List Less 14%
Sunflow 69	Dec. List Less 14% 7%	L51	Dec. List Less 14%
" 70	" " " 14% 7%	L52	Dec. List Less 14%
		L60	Dec. List Less 14%
		L66	Dec. List Less 14%
		L53	Dec. List Less 14%

" KIM		TAN BODY	
Mohawk	Dec. List Less 14%	Mohawk	Dec. List Less 14%
Tweed	Dec. List Less 14%	BALRO-8 Assorted Colors	Dec. List Less 14%
Menarch	Dec. List Less 9%	Menarch	Dec. List Less 14%
Dew Drop	Dec. List Less 14%	Dew Drop	Dec. List Less 14%
Alpine	Dec. List Less 9%	Alpine	Dec. List Less 14%
Modac	Dec. List Less 14%	Modac	Dec. List Less 14%
WEST TRAV.	" " " 14% 7%		

Photos: Lardascope 5-0960 and 5-3051

TECHNICAL PORCELAIN & CHINA WARE CO.

El Cerro, California

BRANCH OFFICE AND WAREHOUSE
223 South Los Angeles Street
LOS ANGELES, CALIFORNIA
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Terms: 1% 10 Days; 30 Days Net; Interest 8% on Overdue Bal.

BAMBOO		WHITE BODY	
Plain White	White List Plus 16%	White List Plus 16%	
L100 Rhinels	Dec. List Less 34%	Dec. List Less 34%	
L101 Marigolds	Dec. List Less 34%	Dec. List Less 34%	
L104 Green Band & Line	Dec. List Less 24-7%	Dec. List Less 24-7%	
L106 Blue Band & Line	Dec. List Less 24%	Dec. List Less 24%	
L107 Blue Band	Dec. List Less 24%	Dec. List Less 24%	
L108 Red Band	Dec. List Less 24%	Dec. List Less 24%	
L50	Dec. List Less 14%	Dec. List Less 14%	
L51	Dec. List Less 14%	Dec. List Less 14%	
L52	Dec. List Less 14%	Dec. List Less 14%	
L60	Dec. List Less 14%	Dec. List Less 14%	
L66	Dec. List Less 14%	Dec. List Less 14%	
L53	Dec. List Less 14%	Dec. List Less 14%	

" KIM		WHITE BODY	
Mohawk	Dec. List Less 14%	Dec. List Less 14%	
Tweed	Dec. List Less 14%	Dec. List Less 14%	
BALRO-8 Assorted Colors	Dec. List Less 14%	Dec. List Less 14%	
Menarch	Dec. List Less 14%	Dec. List Less 14%	
Dew Drop	Dec. List Less 14%	Dec. List Less 14%	
Alpine	Dec. List Less 14%	Dec. List Less 14%	
Modac	Dec. List Less 14%	Dec. List Less 14%	
SHADE LOW LEAF SPECIAL	Dec. List Less 14%	SHADE LOW LEAF SPECIAL	Dec. List Less 14%
3-PLATE CONC.	Dec. List Less 14%	3-PLATE CONC.	Dec. List Less 14%
Tenfold Overwhite etc.	Dec. List Less 14%	Tenfold Overwhite etc.	Dec. List Less 14%
Green & White Brown & White	Dec. List Less 14%	Green & White Brown & White	Dec. List Less 14%
WEST TRAV.	" " " 14% 7%	WEST TRAV.	" " " 14% 7%



PYRAMID ALLOY MANUFACTURING CO.

El Cerrito, California

BRANCH OFFICE AND WAREHOUSE
223 South Los Angeles Street
LOS ANGELES, CALIFORNIA
Tucker 2784

DISCOUNT SHEET

Effective December 1, 1947

SUBJECT TO CHANGE WITHOUT NOTICE

All purchases from El Cerrito Plant and Main Office, 6416 Manila Street, El Cerrito, Calif., will bear the following discount rates on Dec. 1, 1947, List Prices, F.O.B. Plant.

Terms: 1% 10 Days; 30 Days Net; Interest 8% on Overdue Bal.

Red Head *Dec. List Less: 14%*

TAN BODY

Plain Sunflow	White List Plus 16%
Sunglow 61	Dec. List Less 16%
Sunglow 62	Dec. List Less 21%
Sunglow 63	Dec. List Less 11
Sunglow 64	Dec. List Less 19
Sunglow 65	Dec. List Less 9
Sunglow 67	Dec. List Less 19
Sunglow 68	Dec. List Less 19
Sunglow 69	Dec. List Less 19

1st Rm Green (on) Maroon *Dec. List Less 16%*

TAN BODY

Mohawk	Dec. List Less 9%
Tweed	Dec. List Less 11
Monarch	Dec. List Less 9
Dev Drop	Dec. List Less 11
Alpine	Dec. List Less 9
Modoc	Dec. List Less 16%
Western Tanover	Dec. List Less 19%
Emerald Pattern	" " Less 19%
Amethyst	" " " 19%



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Terms: 1% 10 Days; 30 Days Net; Interest 8% on Overdue Bal.

White *Dec. List Plus 16%*

WHITE BODY

Plain White	White List Plus 16%
L100 Palline	Dec. List Less 16%
L101 Marigold	Dec. List Less 16%
L104 Green Band & Line	Dec. List Less 16%
L105 Green Band & 2 Lines	Dec. List Less 16%
L106 Blue Band & Line	Dec. List Less 16%
L107 Blue Band	Dec. List Less 16%
L108 Red Band	Dec. List Less 16%
L50	Dec. List Less 16%
L51	Dec. List Less 16%
L52	Dec. List Less 16%
L60	Dec. List Less 16%
L66	Dec. List Less 16%
L53	Dec. List Less 16%

1st Rm Green (on) Maroon *Dec. List Less 16%*

WHITE BODY

Mohawk	Dec. List Less 19%
Tweed	Dec. List Less 19%
BALBO-8 Assorted Colors	Dec. List Less 19%
Monarch	Dec. List Less 19%
Dev Drop	Dec. List Less 19%
Alpine	Dec. List Less 19%
Modoc	Dec. List Less 19%
Shadow Leaf (on) Ashires	Dec. List Less 19%
3 Fine Coral SPECIALTIES	Dec. List Less 19%
Teapots, Ovenware, etc.	Dec. List Less 19%
Green & White, Brown & White	Dec. List Less 19%
Emerald Blue White	Dec. List Less 19%
Western Tanover	Dec. List Less 19%

[Title of District Court and Cause.]

MOTION FOR PRELIMINARY INJUNCTION

Plaintiff petitions this Court to issue a preliminary injunction restraining defendants from acts of unfair competition and in support of this petition submits the appended affidavits and exhibits and the accompanying points and authorities.

The grounds upon which plaintiff is entitled to a preliminary injunction are:

1. Plaintiff is engaged in the manufacture and sale of hotel china bearing original patterns, such china being identified by plaintiff's trade names "Shadowleaf," "Tweed," "Magnolia," "Hibiscus," etc. (Verified Complaint, paragraphs 4 and 6, affidavits of Elster, page A-2; Stein, page B-2; Wood, page D-3; Delany, page E-2 and 3; Clifford, page F-1 and 2).

2. Salability of china is dependent upon attractive appearance. Distinctive and original patterns have been originated by plaintiff for its hotel china, such patterns being identified by plaintiff's original trade names. (Complaint, paragraph 6; affidavits of Elster, page A-3 and 4; Wood, page D-2; Delany, page E-2 and 3; Stein, page B-2).

3. Plaintiff has extensively sold hotel china bearing its original patterns, under its trade names, throughout California and in many other states. Over fifty dealers are engaged in selling this hotel china. Plaintiff and its dealers have extensively

advertised the china. (Complaint, paragraphs 4, 5 and 6; affidavits of Wood, page D-2 and 4; Delany, page E-2 and 5; Elster, pages A-2 and 3; see Exhibit 8 illustrative of advertisement).

4. Purchasers buy hotel china by appearance and trade name. Purchasers recognize and associate the patterns and trade names as indicating china originating with plaintiff. (Complaint, paragraphs 7, 8; affidavits of Elster, page A-2 and 3; Stein, page B-2; Wood, page D-4; Delany, page E-3 and 5; Clifford, page E-2; Robertson, page C-2).

5. The original patterns and trade names owned by plaintiff, developed by plaintiff's efforts and expenditure of time, money and skill, have developed and represent good will and reputation which is recognized by the trade and purchasing public. (Complaint, paragraphs 7 and 8; Affidavits of Elster, page A-2; Stein, page B-1 and 2; Wood, page D-3 and 4; Delany, page E-3 and 4; Clifford, page F-2 and 3).

6. Defendants have copied plaintiff's distinctive patterns and are selling hotel china bearing such patterns, (Verified Complaint, paragraphs 9 and 10; compare Exhibits 1 and 2, Exhibits 3 and 4, Exhibits 9 and 10, Exhibits 11 and 12, Exhibits 13 and 14; affidavits of Elster, page A-3 and 4; Robertson, page C-2; Wood, page D-4 and 5; Delany, page E-4; Clifford, page F-3).

7. Defendants are selling and offering for sale

hotel china under the trade names owned by plaintiff. (Verified complaint, paragraphs 10 and 11; affidavits of Elster, page A-3 and 4 and Exhibit 7; affidavits of Wood, page D-5; Delany, page E-4; Clifford, page F-3; see Exhibit 6; affidavit of Robertson, page C-2).

8. The authorities cited in the appended memorandum incontrovertibly hold that the distinctive appearance of plaintiff's goods and plaintiff's trade-marks are property rights which must be protected against piracy. Defendants' acts come squarely within the acts prohibited by the Federal Code (see item I of appended memorandum). Unfair competition is established by the effect of defendants' acts upon the average person.

9. Defendants are in direct competition with plaintiff and its dealers. Plaintiff's business is being greatly damaged (Complaint, paragraph 12; affidavits of Wood, page D-4 and 5; Delany, page E-5 and 6). Plaintiff's good will and reputation are being destroyed by the flood of copies and may be irreparably and irretrievably lost unless immediately restrained. The public confidence in plaintiff's goods may be irreparably destroyed unless defendants are enjoined promptly (Affidavits of Elster, page A-5; Wood, page D-6; Clifford, page F-4).

10. Time is of the essence because several important exhibitions and shows are to be held in the near future at which plaintiff and defendants intend to exhibit their wares. Numerous buyers attend these shows. Defendants should be restrained

from unfairly diverting the fruit of plaintiff's good will at these shows and thereby appropriating business which belongs to plaintiff (Affidavits of Wood, page D-6; Delany, page E-6; Clifford, page F-3 and 4).

11. It is therefore respectfully urged that the Court issue a preliminary injunction restraining the defendants and each of them, their agents, employees, dealers and representatives, and each of them, from making or causing to be made, selling, offering for sale, advertising, exhibiting, marketing, or otherwise disposing of china bearing patterns deceptively similar to those originated by plaintiff or referred to or identified by plaintiff's trade names.

Dated this 31st day of May, 1951.

WALLACE CHINA CO., LTD.

By /s/ C. A. MIKETTA,

NAYLOR & LASSAGNE,

By /s/ JAS. M. NAYLOR,

Attorneys for Plaintiff.

AFFIDAVIT OF SIDNEY ELSTER

State of California,

County of Los Angeles—ss.

Sidney Elster, being duly sworn, deposes and states that he is a resident of Los Angeles, California, and that he is part owner of a business

which has been operating under the name of Elster's at Los Angeles, California, for the past twenty years; that Elster's is engaged in the sale of vitrified hotel china, restaurant supplies and restaurant and hotel equipment. Deponent states that he has been actively engaged in the said business for the past seventeen years and is familiar with china and particularly vitrified hotel china as made and sold by various manufacturers for use by hotels, restaurants, etc.; that, based upon his seventeen years of experience with purchasers of vitrified hotel china and china from various manufacturers, as well as statements made to deponent by representatives of various manufacturers of china, deponent knows that Wallace China Co., Ltd., of Los Angeles, California, and china manufactured thereby are held in high esteem and have a high and valuable reputation and good will.

Deponent states that on about May, 1949, James R. Delany, Sales Manager of Wallace China Co., Ltd., first showed to deponent certain pieces of china bearing an overall pattern known as "Shadowleaf"; that to the best of deponent's knowledge this was the first time that deponent had seen a piece of vitrified hotel china provided with an overall pattern and to the best of deponent's knowledge said pattern was new and original; that he does not know and does not believe that a pattern similar thereto was on the market prior to the creation, production and introduction to the trade by Wallace China Co., Ltd.; that Exhibit 3, attached hereto, is a plate bearing said "Shadowleaf" pat-

tern as manufactured by Wallace China Co., Ltd.; that deponent does not know and does not believe that any other manufacturer identified a china pattern by the trade name "Shadowleaf" prior to deponent's knowledge as to the use of such trade name by Wallace China Co., Ltd., in May, 1949.

That deponent first purchased china bearing said "Shadowleaf" pattern and exemplified by Exhibit 3 attached hereto from Wallace China Co., Ltd., in May, 1949; that deponent advertised said pattern using photographs supplied by Wallace China Co., Ltd., in circulars, trade magazines, such as Pacific Coast Record, in daily newspapers and by direct mail; that Exhibit 8, attached hereto, is the front page of one direct mail circular extensively distributed by deponent in California and in other states. Deponent states that said "Shadowleaf" pattern was well received by the trade and became characteristic of and associated with Wallace China Co., Ltd., as the source; that during the years 1949 and 1950 deponent sold about 47,000 pieces of china made by Wallace China Co., Ltd., in said "Shadowleaf" pattern in the states of California, Nevada and New Mexico; that the 1949 sales were about 34,000 pieces and the 1950 sales were about 13,000 pieces.

Deponent states that on or about the first part of October, 1949, he was shown and offered china, bearing a pattern substantially identical to that appearing on china purchased under the trade name "Shadowleaf" from Wallace China Co., Ltd., by one Antone Pagliero, representing Technical Por-

celain & Chinaware Co. of El Cerrito, California, said company being also known as Tepco; that deponent immediately recognized the pattern as a Wallace China Co., Ltd., pattern; that said Antone Pagliero referred to the china being offered for sale by him to deponent as the "Shadowleaf" pattern or a copy of the "Shadowleaf" pattern; that a price list supplied to deponent by Technical Porcelain & Chinaware Co. made reference on its face to china manufactured and sold by Technical Porcelain & Chinaware Co. and bearing the copied pattern as the "Shadowleaf" pattern; that Exhibit 7, attached hereto, is photostatic copy of a price list supplied to deponent by Technical Porcelain & Chinaware Co. Deponent calls attention to the fact that said price list also offers for sale patterns under the trade names "Tweed" and "Hibiscus," both being trade names well known to represent China patterns made and sold by Wallace China Co., Ltd.

Deponent states that purchasers order china by trade name; for example, they ask for "Shadowleaf" and expect to get china manufactured by Wallace China Co., Ltd., and carrying the pattern associated therewith and popularized by Wallace China Co., Ltd.; that by the manufacture, distribution and sale of the copies under the same name, Tepco is making it possible for its dealers to commit a fraud upon the public.

Deponent states that during 1950 deponent purchased some of said "Shadowleaf" pattern from Technical Porcelain & Chinaware Co. (said china

being exemplified by Exhibit 4) and supplied the pieces so purchased to a prior customer of "Shadowleaf" pattern china manufactured by Wallace China Co., Ltd., in order to replace pieces broken in use by said customer; that the said customer did not know and did not recognize that the replacements so supplied him were not from the same source or origin as the originals, but instead was under the belief that they were from the same source, namely, Wallace China Co., Ltd. Deponent states that he purchased said "Shadowleaf" pattern from Technical Porcelain & Chinaware Co. because it had the same appearance and was cheaper in price. Deponent states that the copies of "Shadowleaf" pattern were shipped to Elster's by Technical Porcelain & Chinaware Co. in cartons which closely resembled those used by Wallace China Co., Ltd., which were printed in the same color, namely, blue; that the arrangement of the words and lettering was very similar to that used by Wallace China Co., Ltd., on its cartons and the cartons received from Technical Porcelain & Chinaware Co. bore the trade name "Shadowleaf"; that Exhibit 6, attached hereto, is a photostatic copy of one face of the cartons used by Tepco in the shipment of copies of china under the trade name "Shadowleaf" owned by Wallace China Co., Ltd., that said Exhibit 6 can be compared to Exhibit 5 which shows one face of a carton used by Wallace China Co., Ltd.

Deponent states that in order to maintain the good will, value and popularity of the "Shadowleaf" pattern originated by Wallace China Co.,

Ltd., deponent has refrained from selling the pattern to restaurants or hotels in proximity to each other; that Technical Porcelain & Chinaware Co. has sold the imitation or copy under the name "Shadowleaf" indiscriminately to large restaurants and to small inexpensive lunch rooms and to purchasers having eating places in proximity to each other, whereby the pattern has lost its desirability; deponent states that since Tepco has engaged in the sale of copies, numerous prospective customers have refused to purchase the "Shadowleaf" pattern from deponent by reason of the indiscriminate sale of the copies by Tepco; that deponent's business in china manufactured by Wallace China Co., Ltd., has dropped and decreased by reason of the competition and the disrepute occasioned by acts of Technical Porcelain & Chinaware Co. Deponent is informed and believes and therefore states that the china manufactured and sold by Tepco is inferior in quality, durability and finish to that manufactured by Wallace China Co., Ltd., and that Governmental bureaus of the County of Los Angeles will not purchase Tepco china for use in County institutions for this reason, whereas china manufactured by Wallace China Co., Ltd., is so purchased and used by said County organizations.

That deponent believes and alleges that the acts of Tepco cause deception and confusion of purchasers as to the nature, quality and source of the china sold by Technical Porcelain & Chinaware Co. and constitute unfair trade practices and unfair

competition and are causing irreparable damage and injury to deponent, to Wallace China Co., Ltd., and to other dealers supplied by Wallace China Co., Ltd.

Dated this 27th day of April, 1951.

/s/ SIDNEY ELSTER.

Subscribed and sworn to before me this 27th day of April, 1951.

[Seal] /s/ FAYE POLIN,
Notary Public in and for the County and State
above named.

My Commission Expires Feb. 19, 1952.

DISH CARRIERS — All metal construction. Reinforced wire top edge. \$3.19 ea.

**USED PLATES
50c DOZEN
AND UP**

**See our
Complete
Selection of
Stainless
Steel
ladles and
spoons
59c each
and up.**



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to stock on hand



Designed and made
exclusively for Elster's
in Los Angeles

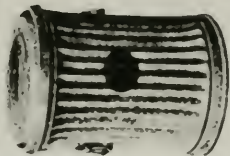


ROAST PAN — 22 gauge black iron, folded corners. Wire reinforced rim, strapped. Drop handles.

Each	95c
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PLATTERS — 10", hotel weight.
Virrified chino, white body with
red line. Per doz. **\$3.95**



COFFEE CREAM
1.5%
100%
100%

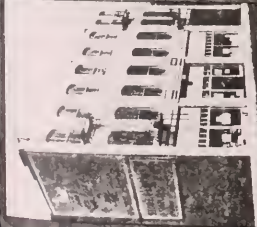
GARBAGE CANS
Heavy Duty
Drop Handle
Immediate
Delivery

ASK ABOUT THE D. T. PLAN — TRADE YOUR OLD DISHES FOR NEW

Shop cash & carry at Elster's new self-service Basement Store

All merchandise subject to stock on hand





*Home of the
Meter-Bank
Payment Plan*

Michigan 6551 ZEnith 6551 115 So. Los Angeles St.
55000 square feet of values
under one roof

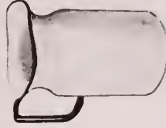
IN THE WHOLESALE DISTRICT

OPEN 8:30 A.M. to 5:30 P.M. INCLUDING SATURDAYS. MONDAYS TILL 9:00 P.M.

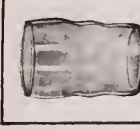
These Sensational Buys Only at ELSTER'S



SALT or PEPPER SHAKERS.—
Resists stains, scratches, rust and
burns. Clear glass body with
heavy duty top. Per doz. 29c



WHITE ENAMEL PITCHER.—4 quart
capacity. Heavy duty with handles
each 99c



WATER TUMBLERS.—8 1/2 oz.
capacity. Made of aluminum.
Heavily known manufacturer.
Per doz. 94c



KNIVES.
Stainless Steel
Bonds
\$1.95



WEAR-EVERY POT with COVER.—
Aluminum. 10 qt. capacity, dome
cover. Heavy duty. Resists stains,
to clean starters. For vegetables,
soups, and meats, etc. Ea. \$3.95

METAL ASH TRAYS
Dishes
97c

FOR ONEIDA
FLATWARE
SEE ELSTER'S

GLASS ASH TRAYS
Dishes
45c

IF YOU ARE
UNABLE TO
visit our Self
Service Store,
happy to ship
your orders C.
O. D. Mail or-
ders receive
prompt atten-
tion.



DISH CARRIERS.—All metal
construction. Stained wire top
edges. \$2.19 ea.



USED PLATES
50c DOZEN
AND UP

See our
Complete
Selection of
Stainless
Steel
ladles and
spoons
59c each
and up.

SEE THE FABULOUS "SHADOW LEAF" PATTERN



FLOOR BRUSH.—Black. 3/4 size. 24"
spined. Brush 18". complete with 48"
screw in stick. Each \$1.95



POST PAN.—27 gauge black iron.
folded corners. Wire reinforced rim.
stamped. Drop handles.
Each 95c



COFFEE CREAMER
Each
1c

GARBAGE CANS
Heavy Duty
Drop Handle
Stainless Steel
Delivery

**HEAVY
CAKE COVERS**
Each
\$1.50

PLATES.—10". heavy weight
stainless steel. Shadow leaf pattern.
red line. Per doz. \$3.95

ASK ABOUT THE D. T. PLAN—TRADE YOUR OLD DISHES FOR NEW

All merchandise subject
to stock on hand

Shop cash & carry at Elster's new self-service Basement Store

AFFIDAVIT OF OSCAR STEIN

State of California,

County of Los Angeles—ss.

Oscar Stein, being duly sworn, deposes and states that he is a resident of Long Beach, California, and that he is the sole owner and operator of a business known as Long Beach Store Fixture Co. located at 330 Locust, Long Beach, California; that deponent has been in said business of distributing restaurant and hotel supplies since 1927; that deponent sells and acts as dealer for vitrified hotel china manufactured by Wallace China Co., Ltd., and by others; that by reason of his twenty-three years' experience with purchasers of vitrified hotel china deponent knows that Wallace China Co., Ltd., of Los Angeles, California, and china manufactured thereby are held in high esteem and have a good reputation and valuable good will.

Deponent states that he does not remember seeing any overall pattern on hotel china manufactured by anyone other than Wallace China Co., Ltd., and that the overall patterns of hotel china manufactured and sold by Wallace China Co., Ltd., are different, distinctive and materially add to the appearance of the china. Deponent states that by the term "overall pattern" reference is made to a pattern which is not composed of a separate and distinct border ornamentation nor to china which carries a border and a separated, centrally disposed decoration, but instead refers to china wherein the entire upper surface of a plate or the entire outer surface of a cup is covered with a pattern.

Deponent states that the appearance of vitrified hotel china is very important, since customers buy china by reason of its appearance and such appearance must be attractive and distinctly different from other china. Deponent further states that customers refer to and purchase china by trade names, such as the trade name "Shadowleaf" applied to a distinctive overall pattern manufactured by Wallace China Co., Ltd., and first shown to deponent by James R. Delany, sales manager of Wallace China Co., Ltd., in 1948; that the trade name "Shadowleaf" is, to the best of affiant's knowledge, original with Wallace China Co., Ltd., and associated with a distinctive pattern of china manufactured and sold by Wallace China Co., Ltd.

Deponent states that he has purchased from Wallace China Co., Ltd., large quantities of china bearing the distinctive overall pattern identified by the trade name "Shadowleaf" and exemplified by Exhibit 3. That in 1948 deponent purchased approximately 27,600 pieces of such "Shadowleaf" china for resale to various restaurants; that in 1949 deponent purchased approximately 13,600 pieces of such china and in 1950 purchased approximately 15,200 pieces of such china from Wallace China Co., Ltd., for resale.

Deponent states that Harold K. Robertson has been employed by deponent for over ten years as salesman and is now manager.

Dated this 18th day of May, 1951.

/s/ OSCAR STEIN.

Subscribed and Sworn to before me this 18th day of May, 1951.

[Seal] /s/ MORRIS S. BROWER,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires March 16, 1955.

AFFIDAVIT OF HAROLD K. ROBERTSON
State of California,
County of Los Angeles—ss.

Harold K. Robertson, being duly sworn, deposes and states that he is a resident of Long Beach, California; that for ten years last past he has been employed as manager for Long Beach Store Fixture Co., located at Long Beach, California, said business relating to the sale of cafe, restaurant and kitchen equipment such as china, glassware, silverware, ranges, etc., said business being owned by Oscar Stein.

Deponent states that in the course of his duties he has sold vitrified china manufactured by Wallace China Co., Ltd., of Vernon, California, and by other manufacturers; that the china manufactured by Wallace China Co., Ltd., has a good reputation and is characterized by distinctive, overall, shaded patterns such as the one known under the trade name "Shadowleaf"; that purchasers buy china by reason of its distinctive pattern or appearance and by trade name, and the "Shadowleaf" pattern and

trade name is associated with and recognized as a Wallace China Co., Ltd., pattern.

Deponent states that about the middle of November, 1950, one Antone Pagliero, representing himself to be acting for Technical Porcelain & China-ware Co., appeared at the Long Beach Store Fixture Co. store and showed to deponent a piece of hotel china which deponent immediately recognized as the Wallace "Shadowleaf" pattern; that said Pagliero offered to sell china bearing such pattern to deponent, for resale; that said Pagliero stated to deponent that the china being offered for sale was a copy of a Wallace China Co., Ltd., pattern.

Deponent further states that deponent received a telephone call from an old customer operating a restaurant in Long Beach, to whom deponent had sold "Shadowleaf" china made by Wallace China Co., Ltd., some months before; that said customer complained that the "last shipment" of "Shadowleaf" china was off-color and that the pattern was smeary; that deponent personally went to the customer's restaurant and discovered that said customer had purchased the imitation of the "Shadowleaf" pattern from Technical Porcelain & China-ware Co. to replace some of the original Wallace china and that the imitation appeared the same to the general observer, but upon close comparison had a slightly different color and the pattern was somewhat smeary.

Dated this 18th day of May, 1951.

/s/ HAROLD K. ROBERTSON.

Subscribed and sworn to before me this 18th day of May, 1951.

[Seal]: /s/ MORRIS S. BROWER,
Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires March 16, 1955.

AFFIDAVIT OF KENNETH O. WOOD

State of California,
County of Los Angeles—ss.

Kenneth O. Wood, being duly sworn, deposes and states that he is the president of Wallace China Co., Ltd., a California corporation, engaged in the manufacture and sale of vitrified hotel china for over twenty years last past, with a plant at Los Angeles, California. Deponent states that he has been president of the said corporation since about August, 1943, and is familiar with all of the operations of the said company, its products, trade names and activities; that sales of the products of the said corporation are under the supervision of James R. Delany, sales manager and that said Delany has been in the employ of deponent and actively engaged in the sale of vitrified hotel china as manufactured and sold by deponent's corporation since about February, 1948.

Deponent states that the principal product manufactured and sold by the said corporation is vitrified hotel china and that said china is highly regarded in the trade for its durability, the imper-

vious, non-porous glaze carried by such china, such glaze being hard, resistant to scratches and capable of standing up under the rapid temperature changes and knocking about to which it is subjected in use without chipping or crazing; that the vitrified hotel china manufactured and sold by deponent's corporation includes a series of attractive, original and distinctive patterns which impart highly desirable and necessary eye appeal and esthetic sense to the said china; that said distinctive patterns originated by deponent's corporation, Wallace China Co., Ltd., are recognized by the trade as indicating origin in deponent's corporation.

Deponent states that although the plant of the corporation is located in Los Angeles, California, approximately 40% of the vitrified hotel china manufactured and sold by the corporation is shipped to dealers outside the State of California and is therefore in interstate commerce; that the sales activities of deponent's corporation cover the entire western half of the United States; and that deponent's corporation has over 50 established dealers in California, Washington, Oregon, Utah, Arizona, Oklahoma, Texas, Kansas, Georgia and elsewhere.

Deponent states that during the past twenty years, by the exercise of judgment and effort and the expenditure of large sums of money for technical assistance, supervision, equipment and materials, the corporation had engendered and built up a large and valuable good will in the high quality and attractiveness of its products; that great care and

much effort is exercised by deponent and the employees of the said corporation in the selection and preparation of clays and ingredients entering into the manufacture of vitrified hotel china, the formation of the ware, in burning the ware, and in the construction and control of the equipment used, in compounding and maturing the glazes, the preparation of the patterns, the inspection of the ware and the packaging of the ware and other operations directed to the manufacture of vitrified hotel china of the highest possible quality and the maintenance of such quality.

Deponent states that in addition to its high durability and excellent physical characteristics, the vitrified hotel china manufactured and sold by deponent's corporation is known for its eye appeal or beauty resulting from the colors and patterns carried thereby; that the corporation has spent time, effort and money in popularizing said distinctive patterns under the trade names "Shadowleaf," "Tweed," "Hibiscus," "Magnolia," etc; that said trade names are used in identifying specific and distinctive patterns originated by deponent's corporation; that said trade names are used in catalogs published by deponent's corporation and in advertising cuts and literature supplied to dealers in products made and sold by deponent's corporation, which cuts and literature are used by the dealers in advertising in daily newspapers and otherwise in the cities in which the dealers are located.

Deponent states that the corporation employs artists to design distinctive patterns and inasmuch

as public tastes change it is necessary and desirable to periodically initiate the manufacture and sale of a new and distinctive pattern; that the corporation employs artists to design such patterns and said artists, in conjunction with other employees, have developed methods of producing highly desirable shading effects on the ware without the necessity of hand painting the ware; that in such process, as developed by deponent's corporation, the artist's drawing of the pattern is etched upon a printing cylinder or roller which is then chromium plated and used in printing the pattern upon a special thin paper stock with specially prepared transfer inks; that suitably cut portions of such transfer are then applied to the chinaware and burned, causing the pattern to be made an integral and inseparable part of the ware in the desired colors; that in this manner distinctive, shaded, overall patterns have been developed, such patterns being distinctive and characteristic of china sold by deponent's corporation.

Deponent states that on or about May, 1948, an artist employed by Wallace China Co., Ltd., produced a distinctive and novel design which was reproduced on a printing cylinder and said design used in the production of vitrified hotel china by the corporation since about July, 1948; that the corporation appropriated, adopted and used the distinctive trade name "Shadowleaf" in identifying its vitrified hotel china bearing said ornamental and distinctive design since about July, 1948; that

the chinaware bearing the said "Shadowleaf" design or pattern was publicized, exhibited, advertised and sold by deponent's corporation and its dealers continuously in interstate and intrastate commerce since about July, 1948, and sales thereof increased rapidly until recent months; that over 112,000 pieces of said "Shadowleaf" china were sold by Wallace China Co., Ltd., during 1949; that in 1950 total sales of "Shadowleaf" china dropped to about 107,000 pieces.

Deponent states that during the summer of 1949 Technical Porcelain & Chinaware Co., a partnership having a plant at El Cerrito, California (said partnership also being known as Tepco) copied the said "Shadowleaf" pattern and began to indiscriminately sell such copies under the trade name "Shadowleaf." Deponent states that Tepco willfully, maliciously and consciously made a copy of the pattern and in support of this statement deponent states that Exhibit 1 attached to the complaint herein is a print of the pattern from the printing rollers used by Wallace China Co., Ltd., since about July, 1948; that Exhibit 2 attached to the complaint is a print of the pattern from a roller used by Tepco, said roller being made for and on behalf of Tepco by the same engraver used by deponent's corporation but without consent or knowledge of Wallace China Co., Ltd. Deponent calls attention to the fact that these two prints, Exhibits 1 and 2, are identical as far a pattern is concerned and have the same arrangement of foreground leaves, middle ground leaves and background; that depo-

ment has examined china manufactured and sold by Tepco and bearing said pattern and deponent states that the Tepco ware is deceptively similar to the ware manufactured and sold by Wallace China Co., Ltd., and deceives the public into the belief that the copies are products made by deponent's corporation. That Exhibits 3 and 4 are exemplars of china made by Wallace China Co., Ltd., and by Tepco, respectively and it is evident that the imitation creates the same effect and deceives the purchaser as to source and identity of the china. Deponent states that such willful, unfair copying of the distinctive pattern, as well as the unlawful use of the trade name "Shadowleaf," has damaged deponent's corporation and its good will and has caused and is causing great damage and injury to the business of Wallace China Co., Ltd., as evidenced by the drop in sales of the said pattern and the reluctance of many dealers and customers to purchase the said pattern because of the indiscriminate, widespread sale of the copies by Technical Porcelain & Chinaware Co.

Deponent states that to the best of his knowledge and belief Technical Poreclain & Chinaware Co. has embarked upon a course of conduct and piracy of the distinctive designs and trade names originated by and first appropriated by Wallace China Co., Ltd., and in support of this statement deponent states that said Technical Porcelain & Chinaware Co. has initiated the manufacture and sale of other distinctive designs first conceived, manufactured and sold by deponent's corporation and

has unlawfully used trade names first appropriated and used by deponent's corporation in identifying such patterns, namely, "Tweed," "Hibiscus" and "Magnolia." That Technical Porcelain & Chinaware Co. is appropriating the results of the efforts of deponent's corporation and is trading on the good will and reputation of Wallace China Co., Ltd., to the great damage and irreparable injury of deponent's corporation by diverting sales from Wallace China Co., Ltd., to Technical Porcelain & Chinaware Co. and its dealers.

Deponent further states that Wallace China Co., Ltd., has gone to great trouble and expense in planning an advertising campaign directed to the presentation and sale of the aforementioned distinctive patterns to the hotel and restaurant trade, including in such promotional efforts attendance and exhibits at various shows and exhibitions; that during June, 1951, a show shall be held at the Shamrock Hotel at Houston, Texas, known as the Texas and Southwestern Regional Restaurant Show sponsored by the Texas Restaurant Association; that thereafter a Pacific Coast Regional Convention and Exhibition sponsored by the Golden Gate Restaurant Association will be held in San Francisco; that deponent's corporation plans to attend and have exhibits at the said shows; that deponent has been informed and therefore believes that Technical Porcelain & Chinaware Co. intends to have its representatives exhibit copies of the various patterns originated by deponent's corporation at the said shows; that irreparable harm would result

from such exhibition of infringing copies and that deponent therefore believes that it is essential that Technical Poreclain & Chinaware Co. be restrained and enjoined from manufacturing, selling, offering for sale, exhibiting, advertising or promoting the sale or publicizing its said copies of the distinctive designs originated by deponent's corporation and from the use of the trade names first appropriated and used by deponent's corporation, prior to trial of this action and permanently thereafter.

Deponent states that Antone Pagliero, general partner of Tepco has been notified of his said unlawful copying of Wallace China Co., Ltd., patterns and trade names, but refused to cease said acts of infringement and unfair competition and, instead has personally told deponent that in the event Wallace China Co., Ltd., were to bring this suit against Tepco, Tepco would drastically reduce prices on the copied patterns of china with the purpose and intent to thereby prevent Wallace China Co., Ltd., from being able to sell its china at a reasonable profit.

Dated this 25th day of May, 1951.

/s/ KENNETH O. WOOD.

Subscribed and sworn to before me this 25th day of May, 1951.

[Seal] /s/ MILDRED K. BADGER,
Notary Public in and for the County and States
above named.

My Commission Expires March 2, 1952.

AFFIDAVIT OF JAMES R. DELANY

State of California,
County of Los Angeles—ss.

James R. Delany, being duly sworn, deposes and states that he is a resident of Los Angeles, California, and since November, 1948, has been and still is sales manager of Wallace China Co., Ltd., a California corporation, manufacturers of vitrified hotel china with a plant and offices at Vernon, California (a subdivision of Los Angeles). Deponent states that he is thoroughly familiar with all of the patterns and types of china manufactured and sold by Wallace China Co., Ltd., the manner in which said patterns are sold, the customers to whom said patterns are sold, etc., and states that approximately 40% of the vitrified china sold by Wallace China Co., Ltd., is sold to purchasers and dealers located outside the State of California.

Deponent states that during the period 1927-1948, he was engaged in sales work for the Dohrman Hotel Supply Company, a corporation having sales office at Los Angeles, San Diego, San Francisco, San Jose, Fresno, Phoenix, Portland and Seattle, as well as in certain other locations; that Dohrman Hotel Supply Company is engaged in the sale of chinaware, glassware and kitchen equipment for use by hotels and restaurants; that during said twenty-one year period with Dohrman Hotel Supply Company affiant became thoroughly familiar with china as manufactured and sold by numerous manufacturers, inasmuch as deponent concentrated his

sales efforts in the sale of chinaware and Dohrman represented six of the leading nationally-known chinaware manufacturers including Wallace China Co., Ltd.; that by reason of his experience with representatives from various chinaware manufacturers and experiences with purchasers of vitrified hotel china deponent knows that prior to 1948, and to this date Wallace China Co., Ltd., and china manufactured thereby are held in high esteem and have high and valuable reputation and good will.

Deponent states that to the best of his knowledge Wallace China Co., Ltd., originated overall patterns for vitrified hotel china, said overall patterns imparting a three-dimensional effect and having an exceptionally attractive appearance; that appearance is extremely important in the sale of china since purchasers buy the china because of its artistic or pleasing appearance and it is necessary that the china be pleasing to the ultimate consumer and user. Deponent states that to the best of his knowledge Wallace China Co., Ltd., were the first to produce china bearing overall patterns and the first to have used trade-names "Festival," "Shadowleaf," "Hibiscus" and "Magnolia" associated with such patterns; that to the best of his knowledge and belief Wallace China Co., Ltd., was the originator of a design sold by Wallace under the name "Tweed" and the originators and first users of such trade-name "Tweed" as applied to a line of china; that "Tweed" is a distinctive pattern in that the decoration leaves a square unadorned in the central area of a circular plate. Deponent states that the various

decorated patterns of china sold by him for and on behalf of Wallace China Co., Ltd., are always referred to by their trade-names; that Exhibits 3, 9, 11 and 13 are representations of china sold under the names "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" by Wallace China Co., Ltd.; that it is the practice to ship said china in corrugated board containers printed in blue and to identify the decoration or pattern and the color thereof on the containers by stencilling or writing the name of the pattern packed within the container; that Exhibit 5 is a photostatic copy of a typical container as shipped by Wallace China Co., Ltd., indicating that its contents comprise the "Shadowleaf" pattern. Deponent states that the various patterns originated and sold by Wallace China Co., Ltd., have been well received by the trade and are characteristic of and associated with Wallace China Co., Ltd., as the source. That a piece of china bearing one of said patterns represents to the purchaser a piece of china of high quality originating with Wallace China Co., Ltd. That Dohrman Hotel Supply Company is an established dealer for china manufactured by Wallace China Co., Ltd., particularly for the pattern known under the trade-name "Tweed," and sells said pattern through its many branch offices in California, Washington, Oregon and Arizona.

Deponent states that he has personally seen price lists distributed by Technical Porcelain & China-ware Co. of El Cerrito, California, said price lists carrying thereon reference to patterns under the

names "Shadowleaf," "Tweed" and "Hibiscus"; that Exhibits 7a and 7b are photostatic copies of such price lists. Deponent states that he has personally seen china manufactured by Technical Porcelain & Chinaware Co., which is also known as Tepco, and sold under the names "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia"; that Exhibits 4, 10, 12 and 14 are representations of patterns of china sold by Tepco under the names "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia."

Deponent states that to the casual observer or purchaser the copies manufactured and sold by Tepco are deceptively similar to the original patterns manufactured and sold under the same trade-names by Wallace China Co., Ltd., and said copies tend to deceive the observer or purchaser as to the quality, nature and source of the china in that the purchaser believes that such china is manufactured by Wallace China Co., Ltd., and are of the high quality associated with such patterns. Deponent states that by the use of the trade-names "Tweed," "Shadowleaf," "Magnolia," etc., Technical Porcelain & Chinaware Co. is falsely representing to the trade that said china is of the same high quality as that manufactured by Wallace China Co., Ltd., and that in effect originates with Wallace China Co., Ltd.; that such acts are contrary to commercial good faith and to the normal and honorable development of business activities. Deponent states that the deception and copying is carried to the containers in which Tepco ships said china in that

the trade-names first appropriated and used by Wallace China Co., Ltd., and by usage and advertising grown to mean china originating with Wallace China Co., Ltd., are unfairly placed upon cartons of china by Tepco, as evidenced by Exhibit 6. Deponent states that the Tepco cartons are deceptively similar to Wallace cartons, as evidenced by a comparison of Exhibits 5 and 6.

Deponent states that he personally makes sales calls on many dealers in hotel and restaurant supplies and that over 50 dealers, in various states of the United States, carry china manufactured by Wallace China Co., Ltd.; that in order to maintain the distinctiveness and desirability of the original patterns of Wallace China Co., Ltd., some dealers carry certain of said patterns while others carry other patterns, and each dealer exercises discretion in the sale of a given pattern to avoid the possibility of having two closely adjacent restaurants use china of the same pattern; that by reason of such careful sales program the distinctiveness, desirability and value of the patterns has been enhanced and maintained.

Deponent states that he personally knows that Tepco has sold its copies to restaurants which originally bought Wallace china and that the said restaurants were deceived in believing that what they bought from Tepco was a product of Wallace China Co., Ltd.; that deponent and his dealers have had to spend much extra time and effort in explaining to dealers and their customers that the china being offered for sale and sold thereto is not the genuine

Wallace china but an imitation, that customers have complained to dealers in Wallace china that the china was inferior to that originally supplied and upon investigation it was found that the complaint was directed to imitations sold by Tepco.

Deponent states that the Tepco imitations are deceptively similar to the originals manufactured by Wallace China Co., Ltd., and have deceived not only the ultimate purchaser but also experienced dealers; that Tepco has sold the imitations and copies indiscriminately and to restaurants in the same vicinity, thereby causing deponent's customers and prospective customers to refuse to buy the Wallace patterns because they were imitated and made common by such indiscriminate selling by Tepco; that as a result of such copying by Tepco the business and sales of Wallace China Co., Ltd., in such copied patterns has decreased and deponent and Wallace China Co., Ltd., have been damaged.

Deponent states that during June, 1951, a show shall be held at the Shamrock Hotel at Houston, Texas, known as the Texas and Southwestern Regional Restaurant show and thereafter a Pacific Coast Regional Convention and Exhibition sponsored by the Golden Gate Restaurant Association will be held at San Francisco; that deponent intends to attend said shows and to exhibit the Wallace china, particularly the distinctive patterns hereinabove referred to and that Wallace China Co., Ltd., is planning to spend considerable sums of money in so advertising and sponsoring the said patterns. Deponent is informed and believes that

Tepco intends to exhibit its copies of the Wallace patterns at the above-described shows; deponent states that irreparable harm and damage and confusion would result from the exhibition and offer to sell such copies, and strongly urges that a preliminary injunction be issued restraining Tepco in order to prevent the good will and reputation of Wallace China Co., Ltd., its products and trade-names from being ruined and destroyed by the unfair acts of Tepco.

Dated this 24th day of May, 1951.

/s/ JAMES R. DELANY.

Subscribed and sworn to before me this 24th day of May, 1951.

[Seal] /s/ MILDRED K. BADGER,
Notary Public in and for the County and State
above named.

My Commission Expires March 2, 1952.

AFFIDAVIT OF STEPHEN J. CLIFFORD

State of California,
County of Los Angeles—ss.

Stephen J. Clifford, being duly sworn, deposes and states that he is a resident of Los Angeles, California; that for three years last past he has been and still is employed by Wallace China Co., Ltd., of Huntington Park, Vernon, County of Los Angeles, as salesman; that said Wallace China Co., Ltd., is engaged in the manufacture and sale of

vitricified hotel china; that deponent is engaged in selling the said china throughout the State of California and in Washington, Oregon, Arizona and elsewhere. Deponent states that approximately fifty dealers located in California and in other states sell and distribute the Wallace china; that said dealers are supplied with photographs and advertising matter.

Deponent states that Wallace China Co., Ltd., originated distinctive overall patterns for its hotel china, said patterns imparting a three-dimensional effect and being characterized by a gradation of shading which imparts an exceptionally attractive appearance to the china; that said original designs are extensively sold by deponent for and on behalf of Wallace China Co., Ltd., under trade-names originated and appropriated by Wallace, said names including "Shadowleaf," "Tweed," Hibiscus" and "Magnolia."

Deponent states that purchasers buy china by appearance and trade-name and that the patterns and trade-names owned and appropriated by Wallace China Co., Ltd., have acquired good will and represent to the purchasers hotel china originating with Wallace China Co., Ltd., and characterized by the high quality and good business reputation of the said company. Deponent states that from his contact with various distributors and with representatives of other manufacturers of hotel china, deponent knows that the patterns and trade-names of Wallace China Co., Ltd., have acquired great good will and a reputation for quality and de-

pendability; that the original patterns and trade-names herein referred to, developed by Wallace China Co., Ltd., represent good will and reputation which is recognized by the trade and purchasing public.

Deponent states that he has personally ascertained that Technical Poreclain & Chinaware Co. of El Cerrito, California, said company being also known as "Tepco," has manufactured, sold and offered for sale imitations or copies of said distinctive and original patterns originated by Wallace China Co., Ltd.; that Exhibit 3 appended to the complaint herein is a representation of a plate bearing what is known as the "Shadowleaf" pattern, manufactured by Wallace China Co., Ltd.; that Exhibit 4 appended to the complaint is a representation of a plate manufactured and sold by Tepco under the name "Shadowleaf"; that the china manufactured and sold by Tepco under the name "Shadowleaf" is deceptively similar to the pattern sold by Wallace.

Deponent states that in the course of his travels out of the State of California deponent has personally seen hotel china being exhibited and offered for sale by dealers in states other than California, the china being an imitation or copy of the Wallace "Shadowleaf" pattern and exemplified by Exhibit 4, said imitation being manufactured and sold by Tepco.

Deponent states that the distribution of copies and imitations by Tepco has caused confusion among dealers and purchasers and has deceived them into

believing that the china is manufactured by Wallace China Co., Ltd.; that deponent has had to spend additional time and effort in calling upon dealers and customers to investigate complaints caused by the sale by Tepco of copies of the distinctive and unique designs originated by Wallace; that deponent has received numerous complaints from his dealers by reason of the widespread sale of the imitations manufactured by Tepco and that the business of Wallace China Co., Ltd., in the sale of china bearing the aforesaid distinctive patterns has been damaged by the acts of piracy by Tepco.

Deponent states that one of the best means of advertising and selling hotel china is by personal contact and exhibitions of china at shows and conventions and that in the past deponent and the Sales Manager, James R. Delany of Wallace China Co., Ltd., have attended and exhibited the patterns hereinabove referred to at numerous shows in the western part of the United States and intend to continue such practice. Deponent states that during June, 1951, a show shall be held at the Shamrock Hotel at Houston, Texas, known as the Texas and Southwestern Regional Restaurant Show and that thereafter a Pacific Coast Regional Convention and Exhibition, sponsored by the Golden Gate Restaurant Association will be held at San Francisco; deponent is informed and believes that an extensive exhibit of Wallace china, including the said distinctive patterns, has been planned for both of said shows, inasmuch as many buyers attend these shows; deponent is informed and believes that Tepco intends

to exhibit its imitations and copies of the Wallace patterns at the above-described shows; deponent states that steps must be taken promptly to stop the acts of copying and misrepresentation whereby the good will and reputation of the Wallace patterns and trade-names is being irreparably injured and to stop Tepco from exhibiting its said copies at the above-described shows in order to prevent confusion and deception of purchasers and the probable destruction of the good will and reputation which has been acquired in said patterns and trade-names by Wallace China Co., Ltd.

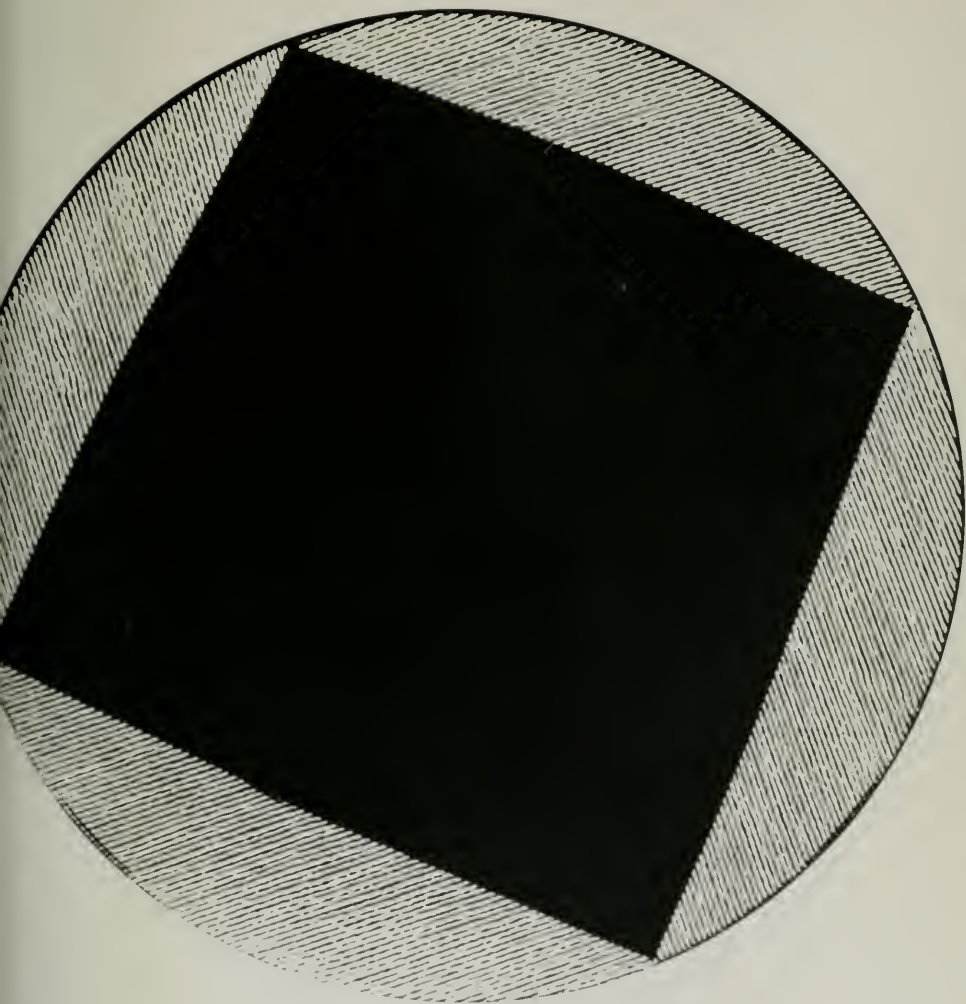
Dated this 24th day of May, 1951.

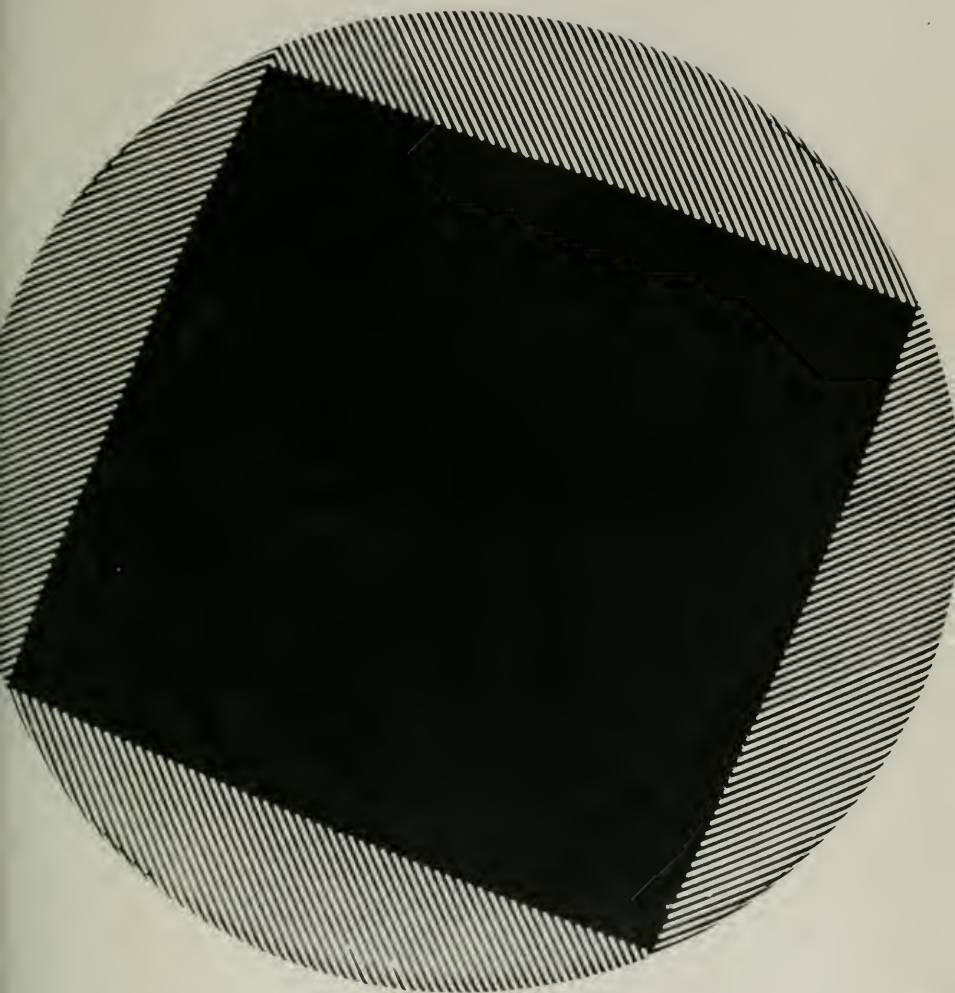
/s/ STEPHEN J. CLIFFORD.

Subscribed and sworn to before me this 24th day of May, 1951.

[Seal] /s/ MILDRED K. BADGER,
Notary Public in and for the County and State
above named.

My Commission Expires March 2, 1952.













Endorsed : Filed May 31, 1951.

Exhibit 14
33A

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

To Antone Pagliero, Arthur Pagliero and John Pagliero, doing business as Technical Porcelain & Chinaware Co. and Antone Pagliero, Mary Jean Pagliero and Delina Pagliero, doing business as Pyramid Alloy Manufacturing Co., and Henry G. Hardy, their attorney:

Plaintiff having filed its verified complaint and a motion for preliminary injunction, together with affidavits of Sidney Elster, Oscar Stein, Harold K. Robertson, Kenneth Wood, James R. Delany and Stephen J. Clifford, and exhibits attached thereto and good cause appearing:

It Is Hereby Ordered that said defendants Antone Pagliero, Arthur Pagliero and John Pagliero, doing business as Technical Porcelain & Chinaware Co. and Antone Pagliero, Mary Jean Pagliero and Delina Pagliero, doing business as Pyramid Alloy Manufacturing Co., and Henry G. Hardy, their attorney, appear before this Court at 10:00 a.m. on June 7, 1951, then and there to show cause, if any they and each of them and their agents, representatives, employees, and those acting in concert with them should not be restrained and enjoined during the pendency of this action from manufacturing, selling, offering for sale, exhibiting, advertising or promoting the sale of patterns of china under the trade-names "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" or similar

in appearance to patterns known by such trade-names and exemplified by Exhibits 3, 9, 11 and 13 on file herein.

It Is Further Ordered that a copy of the complaint and motion for preliminary injunction on file herein and of this Order be served on said defendants and their counsel forthwith.

Dated this 31st day of May, 1951.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed May 31, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF ANTONE PAGLIERO

State of California,
City and County of San Francisco—ss.

Antone Pagliero, being first duly sworn on oath, deposes and says that

1. He is one of the two Defendants named in the above-entitled case, which has been served with process herein.

2. He is one of the partners doing business as Pyramid Alloy Manufacturing Co., (the other named partners not having been served with process herein) and states of his own knowledge that the partnership known as Pyramid Alloy Manufacturing Co. has never sold or offered for sale any hotel china or other china suitable for such purposes

under the names "Shadowleaf," "Magnolia" or "Hibiscus."

3. That among other reasons, Pyramid Alloy Manufacturing Co. was formed October 29, 1947, as a sales organization for the products manufactured by Technical Porcelain and Chinaware Co. (hereinafter referred to as "Tepco") and that said business was abandoned as of August 1, 1949, in accordance with the attached letter marked Exhibit A which was sent to the trade throughout the United States prior to August 1, 1949.

4. This affiant states that the hotel china known in the trade as "Tweed" represents a design which has been used and manufactured by Tepco long prior to the year 1947, and is the identical design of dinnerware known as "Tweed" now manufactured by Tepco and sold under the name "Tweed"; further affiant sayeth not.

/s/ ANTONE PAGLIERO.

Subscribed and sworn before me this sixth day of June, 1951.

[Seal] /s/ FRANCES R. WIENER,
Notary Public.

My Term Expires February 17, 1954.

EXHIBIT "A"

Pyramid Alloy Manufacturing Co.

6416 Manila Street

Contra Costa County

El Cerrito, California

Gentlemen:

This letter is conveying a message of dual purpose and we trust you will welcome it with the understanding which is most fitting for the present situation.

First: For the past year and a half it has been our pleasure serving you and we want to express our appreciation for your past patronage.

The Pyramid Alloy Manufacturing Co. was organized to serve as a Sales Division and for the sole purpose of giving better service, thus creating goodwill and naturally bringing us closer to each jobber. It was our intention to distribute a super product, which was in process at that time. However, time has its own way of changing events.

Second: With the retarding of sales, we like many others found it necessary to meet this condition by reducing force, curtailing routine and eliminating that which was not absolutely necessary, consequently we are removing the Pyramid Alloy Manufacturing Co. from our pages of history as of August 1, 1949, and turning back to the originators, Technical Porcelain & Chinaware Co., nationally known manufacturers of "Tepco Vitrified China." Also, the super products previously referred to, which will be known as "Pamco Oven Ware," taken over by them.

Beginning August 1, please address all correspondence and orders to the Technical Porcelain & Chinaware Co. Orders now in our possession will be filled in the usual manner until such time as they are completed in their entirety. Payments on orders filled after August 1, will be made to Technical Porcelain & Chinaware Co., but orders filled before that date will be payable to Pyramid Alloy Manufacturing Co.

All prices and discount sheets will remain the same. The packing department has added a new feature to accommodate you, by packing in cartons specially constructed for the various types of ware. Prices on cartons will be notated on price list now being printed for Technical Porcelain & Chinaware Co.

In closing may we express hope that we will not only have your cooperation, but your full support.

Very truly yours,

PYRAMID ALLOY
MANUFACTURING CO.

.....,

Antone A. Pagliero,
Co-Partner.

LD:mjp

[Endorsed]: Filed June 7, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF ARTHUR PAGLIERO

State of California,

City & County of San Francisco—ss.

Arthur Pagliero, being first duly sworn on oath, deposes and says that he is one of the Defendants named in the above-entitled case and that he is one of the partners doing business as Technical Porcelain and Chinaware Co. at 6416 Manila Street, El Cerrito, California, and states the facts to be as follows:

1. That he has read the bill of complaint herein, the motion for preliminary injunction, the affidavits filed in support of said preliminary injunction and has examined the several exhibits alleged to illustrate the statements therein and categorically denies each and all of said statements and allegations as being untrue and not founded upon facts.

2. He has literally spent his entire life in the vitrified chinaware industry as his father started the first vitrified china plant on the Pacific Coast in the City of Richmond in 1910 and has been continuously engaged in this industry since that time; he is now Production Manager for the Technical Porcelain and Chinaware Co.—hereinafter referred to as “Tepco”—and has charge of all phases of production in the Tepco plant, including mixes, charges, formulas, patterns, testing, analysis of raw materials, laboratory, and he, with his brother

determines the designs which are to be selected for production together with the amount thereof.

3. He is familiar with all types, and machines useful in connection therewith, of means for decorating hotel china and the like, and that several methods of decoration are daily practiced in the Tepco plants; one of the methods being used in the Tepco plant is the so-called transfer method where the artist's hand-drawn design is etched photomechanically upon the outer surface of a metal cylinder in accordance with the standard methods of photoengraving in the printing industry, the cylinder being used to print the design pattern on a thin paper so that suitably cut-out portions of such transfer may then be applied to the china-ware prior to the glazing and then fired so that the pattern becomes an integral and inseparable part of the ware showing through the transparent glaze and that such methods and practice has been carried on throughout this affiant's entire life and for many years prior thereto. This affiant states that such method was not originated by Wallace China Company, Inc., and is used by every china manufacturer in this country and many in England.

4. All over patterns of the type described in said Affidavits and particularly the Affidavit of Kenneth O. Wood, President of Wallace China Co., Ltd., and referred to in the other Affidavits, was not originated by Wallace China Co., Ltd., but has, in fact, been used for many years by other manufacturers of hotel china such as Mayer China Co.

of Beaver Falls, Pennsylvania, as exemplified by the piece of china—vitrified hotel ware marked Exhibit “B” which is referred to herein, and which piece of china has been in this affiant’s possession for more than four years prior to the date hereof. A further example of an allover pattern is illustrated by the advertisement of John Shaw and Sons, England, showing a chintz design in “Pottery and Glass” for April, 1950; this design has been on the market for several years prior to the date of said advertisement; that a pattern known as “rose chintz” of an allover design in a single color is further illustrated in the “Montgomery Ward” catalog for the year 1951, although this same design has been available for many years prior thereto. There have been numerous other allover patterns of very old designs such as the blue “Willow Ware” and the “Meissen” onion design, which designs themselves are over a hundred years old. Accordingly, it is not possible for Wallace China Co., Ltd., to even claim to be the originator of allover patterns for vitrified hotel china or the originator for allover patterns for any china.

5. Tepco employs its own artists to prepare the original drawings from which the cylinders are made and the artist which was employed to make the so-called “Shadowleaf” design, the “Hibiscus” design and the “Magnolia” design, although a resident of Los Angeles is presently on a trip in the East and unavailable for consultation at this time; further, it is not known exactly when he will re-

turn, but he is not expected to return for at least another two weeks.

6. The cylinders used by Tepco for the pattern known in the trade as "Tweed" was made by an artist many years ago whose name has been forgotten and the records of which in Tepco have now been destroyed in a fire. The artist was one who was employed by the "New Method Engraving Co." which made the original cylinder for this pattern and which company has discontinued engraving pottery cylinders since about 1946.

7. The engraving of pottery cylinders is a specialized field and since 1949 and in the Fall of that year, the cylinders have been made for Tepco by Garnier Engraving Company of Los Angeles. This affiant is informed and believes that the Garnier Engraving Co. also engraves pottery cylinders for other companies including Wallace China Co., Ltd., Vernon Pottery Co., Gladding McBean and numerous others. Between the years 1946 and the Fall of 1949, cylinders were made for Tepco by Graphic Arts of San Francisco.

8. At no time has Tepco used or employed any original art work belonging to or the property of Wallace China Co., Ltd., and similarly it has not used or employed any cylinders belonging to or the property of Wallace China Co., Ltd.

9. It has long been the practice in the production of vitrified hotel china for the several companies engaged in this industry all over the United

States and elsewhere, to offer for sale and produce designs either identical with or very similar to those of other manufacturers except in cases where the design has been either patented or copyrighted and that both Wallace China Co., Ltd., and Tepco have been engaged in this practice with the others for a period of many years, and that such practice is standard for this industry.

10. That Tepco china and particularly its vitrified hotel ware is made to meet the standards set up in the federal specifications for chinaware; vitrified No. M-C-301a April 21, 1943, as are all the other hotel vitrified china made by other manufacturers including Wallace China Co., Ltd.; that Tepco ware meets all of the standards and requirements of this specification and more so, and has been accepted for use by the United States Navy, the Marine Corps, the United States Army and the United States Air Forces. Tepco received the "Certificate of Achievement" for excellence in production and performance during World War II, which certificate was signed by the Assistant Secretary of the Navy, Mr. Hensell.

11. Tepco and Tepco products enjoy a fine reputation in the industry and with the public, which is quite as high as anything Wallace China Co., Ltd., can claim.

12. This affiant states that all vitrified hotel ware put out by Tepco has either the trade-mark Tepco or some other trade-mark of Tepco stamped

under the glaze and forming an integral part thereof showing it as the source of origin, with the possible exception of some small individual butters and creamers. That such marks have long been used in the industry and considered as adequate means for identifying the manufacturer. The public is thoroughly familiar with this means of identifying the source of origin.

13. Tepco is jealous of its position in the industry and purchasing public and has never and would not now permit its products, no matter of the design, to be passed off as and for the product of another manufacturer.

14. Tepco has no intention of and is not going to exhibit any of its products in Houston, Texas, in June of 1951. If any such decision had been made this affiant would have known and would have participated in it.

Further affiant sayeth not.

/s/ ARTHUR PAGLIERO.

Subscribed and sworn before me this 6th day of June, 1951.

[Seal] /s/ FRANCES R. WIENER,
Notary Public in and for the City & County of San
Francisco, State of California.

My Commission Expires February 17, 1954.

[Endorsed]: Filed June 7, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF ANTONE PAGLIERO

State of California,

City and County of San Francisco—ss.

Antone A. Pagliero, being first duly sworn on oath, deposes and says that he is one of the defendants in the above-entitled action named as a partner doing business as Technical Porcelain and China-ware Co., and makes this Affidavit in opposition to the Motion for Preliminary Injunction, stating the facts to be as follows:

1. He has read the Motion for Preliminary Injunction, the Bill of Complaint herein, and the several Affidavits tendered in support of said Preliminary Injunction, and has examined the exhibits accompanying the same and he hereby denies the alleged facts and inferences as set forth therein or intended so to be as not being founded upon fact or truth, to the best of his knowledge and belief.

2. He was literally born and raised in the vitrified china industry and started soliciting the trade and selling electrical insulators, heat resisting porcelain articles and hotel vitrified china covering the entire United States and Canada, when he was 14 years old. He is presently in charge of all sales for Technical Porcelain and Chinaware Co. which is hereinafter referred to as "Tepco," and that he is the only one who contacts the dealers and distributors for Tepco hotel vitrified chinaware, with the exception of the Los Angeles area, at which

location Mrs. Marge Cheever has been employed for the last ten years and is in charge of the Los Angeles warehouse and office.

3. He is thoroughly conversant with all phases of selling and merchandising in this industry and is entirely familiar with the products and competing lines made by other manufacturers made in the United States, Canada and elsewhere. Tepco does not sell to consumers, but sells only to jobbers and dealers for resale and in this connection, this affiant contacts the Tepco jobbers and dealers throughout the United States and in the Los Angeles area in conjunction with Mrs. Cheever. This affiant in selling Tepco products for twenty-eight years has never knocked a competitor, run down their personnel, or their products, or in any other way disparaged his competition on the theory that every knock is a boost and that he was only interested in selling Tepco products. That having learned the hard way that this is the best policy, he personally enjoys the respect and hospitality of the majority of his customers and that both the Tepco products and he personally have an excellent personal relationship and reputation with all of his customers. The fine reputation and good will of Tepco and its products is best expressed by the fact that since the founding of Tepco in 1920, its business has increased year by year steadily up to the present time.

4. Tepco has one of the most modern and up-to-date plants for the manufacture of vitrified hotel

china in the United States and the standards to which its products are required to adhere meet all Government specifications with a good margin beyond the minimum requirements.

5. That it is common practice to publish discount sheets in the sale of vitrified hotel china and that this practice was established and originated in the industry through this affiant's efforts commencing in 1932. Such practice has been adopted by the entire industry and persists up to the present time.

6. That it has been common practice in the industry for the several firms engaged therein to duplicate or approximate designs and patterns used by another or other manufacturers and that this practice has been followed by Wallace China Co., Ltd. and Tepco as well as the other manufacturers, and that the same or similar code numbers or words are used to designate the particular design; for example, L-100 is recognized throughout the industry as a pin line decoration, L-101 as marigold decoration, L-104 as a green band and line. Tepco identifies its products by such references and so does Wallace China Co., Ltd. While Tepco has never followed the policy of having exclusive distributors, this situation as well as the fact that it is common practice for manufacturers or similar designs such as Tepco "Mohawk" and Wallace China Co., Ltd.'s "Del Mar" patterns brought about the writing of the letter dated September 13, 1937, by the then sales manager for Wallace China

Co., Ltd. to Smiths Hotel and Bar Supply Co. of San Diego, the said letter being given this affiant by Mr. R. W. Smith of the said supply company. The letter clearly recognizes that the copying and simulation of designs for vitrified hotel ware as early as 1937 were so close that the dealer could mix two lines when filling an order.

7. This affiant states that the practice in the trade of using the same or similar designs when the same are not protected either by copyright or patent justifies any copying which is indulged in by both the plaintiff and the defendant in this case.

8. Copying and simulation of designs has grown up in the industry because of public demand. For example, a restaurant may be completely supplied with a design for vitreous hotel ware made by Wallace China Co., Ltd. or any other manufacturer and some dispute or disagreement may arise with the local distributor or dealer for that manufacturer. The customer wants to get lines and ware which will fit in with his then pattern from another source and it may very well be that a dealer or distributor for Tepco would say he could get this order if the pattern can be duplicated or simulated, which is done. The customer and the public are happy because they are not bound to a single source of supply which could hold them up as to price, delivery or any other reason which would make competition impossible. The practice of copying and simulation of designs is well established in this industry and its practice is fully justified and accepted in the trade with the public getting the benefit

thereof. Such copying and simulation of designs in the trade is limited to unpatented and uncopyrighted designs as statutory rights are respected by all manufacturers.

9. All of the Tepco designs have been created by artists employed by Tepco which includes the design alleged to be "Shadowleaf," "Magnolia," "Hibiscus" and "Tweed." The "Tweed" design has been used by Tepco for many years and long prior to any use claimed or alleged by Wallace China Co., Ltd. and therefore, this design has been copied by Wallace from Tepco rather than vice versa as alleged. Accordingly, Tepco has a cause of action against Wallace China Co., Ltd. on the same basis that is alleged in this case. The "Magnolia" design is known as "Dixie" in the Tepco line and the only resemblance is that both depict a magnolia blossom. The "Hibiscus" pattern which is called "Hawaiian" in the Tepco line only resembles the Hibiscus of the Wallace line in that it is a representation of a hibiscus blossom. The "Shadowleaf" pattern so-called which is called "Palm Leaf" in the line as well as "Shadowleaf" resemble each other because they are representations of actual tropical leaves. Each of these names is descriptive of the design and such descriptive names belongs to everyone including Tepco and cannot be the property of Wallace China Co., Ltd. exclusively. The names denote the designs, not the manufacturer and therefore cannot be trade-marks.

10. There has never been a piece of china put

out by Tepco without the name "Tepco" on it or other trade-mark indicating "Technical Porcelain and Chinaware Co." as the source of origin, with the possible exception of small individual creamers and butters. The trade-mark "Tepco" and other indications of origin in Tepco are placed on the bottom of each article prior to glazing and become an integral part of the china after each individual has passed through the kiln so that there is no possibility of removing or altering the trade-mark. Such methods and means of identifying the origin of each piece has always been considered as entirely adequate means for identifying the source and origin of each piece of chinaware; the trade and the public have for many years been schooled in the identification of chinaware by this means.

11. To the best of this affiant's knowledge and belief there has never been a piece of Tepco china, regardless of its design, shape or color, which has been sold as, for or represented as made by any other manufacturer including Wallace China Co., Ltd. Three generations of this affiant's family are, and have been engaged in the manufacture, sale and distribution of Tepco ware and are justifiably proud of the record, reputation and integrity of their own product and all are constantly watchful to see that its good name and reputation are maintained.

12. This affiant is advised and Wallace China Co., Ltd., through its counsel, admits that the designs called "Shadowleaf," "Tweed," "Magnolia" and "Hibiscus" are not protected by Design Letters

Patent or by Copyright and that the same have been used and published by Wallace China Co., Ltd. long past the one year of public use in which the designs could have been patented. Likewise, this affiant has been advised and the same has been admitted by counsel for Wallace China Co., Ltd. that the trade-marks, so-called, "Shadowleaf," "Tweed," "Magnolia" and "Hibiscus" are not registered either in the United States Patent Office or in the State of California.

13. Tepco uses two forms of shipping containers, (1) cartons and (2) barrels. The cartons used are standard cartons of standard specifications for this industry and carry the name "Tepco China Co." with the usual standard blanks for identifying the contents. At the present time and for several months last past, the cartons being used also carry another trade-mark adopted and exclusively owned by Tepco entitled "Western Traveler" with a design representing a stage coach drawn by horses. This design also carries the identifying word "Tepco." If one can read, there is no possible way to confuse the Tepco carton with the carton of Wallace China Co., Ltd. or any other manufacturer using a similar standard form.

14. This affiant states that in his own knowledge acquired through years of experience in the industry, that the allover pattern design for hotel vitrified china made with transfers from engraved cylinders was not introduced and first used by Wallace China Co., Ltd., but has been used by many

other firms long prior to Wallace's first claimed use in 1948.

15. To the best of this affiant's knowledge and belief, the so-called "Shadowleaf" design was not originated by Wallace China Co., Ltd., but was taken directly from a fabric design without change and that this affiant was aware of said fabric design and advertisements representing it and that this affiant saw them in June or July of 1950. He made a clipping of such advertisements and although he has instituted a diligent search therefor, he has not been able to locate the same to date.

16. That Tepco does not intend to exhibit any of its wares at the show to be held during June of 1951 at the Shamrock Hotel in Houston, Texas, i.e., The Texas and Southwestern Regional Restaurant Show, and that if Tepco had so intended and was so going to exhibit, he would have known and would have participated in such a decision; further, it is now too late to establish any kind of exhibit or secure space for such show.

Further affiant sayeth not.

/s/ ANTONE A. PAGLIERO.

Subscribed and sworn before me this 6th day of June, 1951.

/s/ FRANCES R. WIENER,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires February 17, 1954.

[Endorsed]: Filed June 7, 1951.

[Title of District Court and Cause.]

ORDER

Pursuant to stipulation of counsel it is hereby ordered that the action be dismissed as to Pyramid Alloy Manufacturing Co., subject to reinstatement of the action upon the trial, if warranted by the facts then and there adduced.

Dated June 7, 1951.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed June 7, 1951.

[Title of District Court and Cause.]

ORDER

Good Cause Appearing Therefor, let the preliminary injunction issue as prayed for in the motion.

It Is Further Ordered that the attorneys for plaintiff prepare the form of the injunction.

Dated June 7, 1951.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed June 7, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff's Motion for Preliminary Injunction having on June 7, 1951, come on regularly for hearing in open court, plaintiff having been represented by C. A. Miketta, of Los Angeles, California, and Jas. M. Naylor, of Naylor and Lassagne, San Francisco, California, and defendants having been represented by Henry Gifford Hardy and Edward B. Gregg, both of San Francisco, California, upon the Verified Complaint, affidavits, certain physical exhibits, and testimony in open court, the matter having been fully argued and submitted, the Court, for the purposes of plaintiff's aforesaid Motion for Preliminary Injunction and on the record presently before the Court, now makes the following findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure and Rule 5(e) of the Rules of Practice of the District Court of the United States for the Northern District of California:

Findings of Fact

1. Plaintiff, Wallace China Co., Ltd., is a corporation organized and existing under and by virtue of the laws of the State of California and has an established place of business at Huntington Park, Vernon, County of Los Angeles, California, adjacent the City of Los Angeles.

2. That the defendants, Antone Pagliero, Arthur

Pagliero and John Pagliero, are residents of the Northern District of California and general partners doing business as Technical Porcelain & Chinaware Co., with an established office and plant at 6416 Manila Avenue, El Cerrito, Contra Costa County, State of California, and that of these named defendantas John Pagliero has not yet been served with Summons and a copy of the Complaint or the Order to Show Cause issued May 31, 1951, or Plaintiff's Motion for a Preliminary Injunction.

3. That defendants, Antone Pagliero, Mary Jean Pagliero and Delina Pagliero, are partners under the name and style Pyramid Alloy Manufacturing Co., but defendants represent that they ceased doing business in the selling of chinaware prior to August 1, 1949, and it was stipulated by counsel at the hearing that the action may be dismissed as to said Pyramid Alloy Manufacturing Co., subject to reinstatement of the action upon the trial, if warranted by the facts hereafter adduced.

4. That plaintiff is engaged in the manufacture and sale of vitrified hotel china throughout the western part of the United States of America and the Territory of Hawaii, and ships its products in interstate commerce.

5. That in the course of its business plaintiff has adopted and used as trade names or trade marks to indicate china of its manufacture the notations "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia," said trade-marks have not been registered under any Federal Act or under the Laws of the

State of California, and the said trade names and trade marks have been applied by plaintiff to containers in which said china is shipped and sold in interstate and intrastate commerce.

6. That plaintiff has caused to be prepared for it certain original patterns and vitrified hotel china incorporating said patterns have been manufactured and sold by plaintiff under the identifying trade names or trade marks "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia;" that said patterns are exemplified by Exhibits 3, 9, 11 and 13 appended to the Motion for Preliminary Injunction. None of said decorative patterns has been copyrighted or protected by Design Letters Patent and the time for doing so has passed. That plaintiff's said trade names represent plaintiff's good will and reputation; that the said patterns are known to and recognized by the trade as indicating china originating with plaintiff.

7. That the defendants have caused the aforesaid "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" patterns to be copied and imitated and have incorporated such copies into vitrified hotel china manufactured and sold by them in intrastate and interstate commerce.

8. That the defendants, in offering for sale and selling said vitrified hotel china embodying copies of plaintiff's aforesaid designs, have identified such goods by employing plaintiff's aforesaid trade names or trade marks "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia," and have caused said

trade names or trade marks to be used in price lists and discount sheets and to be affixed to shipping containers containing defendants' said goods.

9. That plaintiff gave the defendants written notice of unfair competition and infringement under date of May 5, 1951, and despite said notice defendants have continued to manufacture and sell vitrified hotel china embodying the aforesaid copies of plaintiff's patterns and the use of the trade names or trade-marks "Shadowleaf," "Tweed," "Hibiscus" and Magnolia" in the identification of the same.

Conclusions of Law

I.

That plaintiff is the owner of the trade names or trade marks "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" as applied to hotel china and is entitled to the exclusive use thereof as against these defendants.

II.

That plaintiff is the owner of the distinctive patterns identified by the trade names or trade marks "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" exemplified by Exhibits 3, 9, 11 and 13 appended to the Motion for Preliminary Injunction, and is entitled to the exclusive right to incorporate said patterns in hotel china as against the defendants.

III.

That this Court has jurisdiction of this cause under the Lanham Act, 15 USCA, Secs. 1051-1127

and under the Paris Convention and the Inter-American Convention.

IV.

That the defendants, by manufacturing, advertising and selling hotel china under the trade names or trade marks "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia," have infringed plaintiff's rights therein and have competed unfairly with the plaintiff.

V.

That the defendants, by copying and imitating plaintiff's patterns identified by the trade names or trade marks "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" and exemplified by Exhibits 3, 9, 11 and 13 of record herein, and by manufacturing and selling hotel china incorporating the same, have competed unfairly with the plaintiff.

VI.

That plaintiff is entitled to a judgment against the defendants, Antone Pagliero and Arthur Pagliero, as copartners, with John Pagliero, doing business as Technical Porcelain & Chinaware Co., awarding plaintiff a preliminary injunction to be issued out of and under the seal of this Court enjoining the said defendants and each of them, their agents, representatives, attorneys, servants and those persons acting in privity, participation and concert with *the*, who receive notice of such judgment by personal service or otherwise, from infringing plaintiff's rights in any manner and from making and causing to be made, selling, offering

for sale, advertising, exhibiting, marketing or otherwise disposing of china bearing patterns deceptively similar to those originated by plaintiff, said patterns being exemplified by Exhibits 3, 9, 11 and 13 of record in this action, and from using plaintiff's trade names or trade marks "Shadow-leaf," "Tweed," "Hibiscus" and "Magnolia" in the identification of hotel chinaware manufactured and sold by the defendants.

VII.

That the action be dismissed as to Pyramid Alloy Manufacturing Co. subject to reinstatement of the action upon the trial hereof if warranted by the facts then and there adduced.

Dated June 20, 1951.

EDWARD P. MURPHY,

United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed June 20, 1951.

In the United States District Court, Northern
District of California, Southern Division

Civil Action No. 30595

WALLACE CHINA CO., LTD.,

Plaintiff,

vs.

ANTONE PAGLIERO, ARTHUR PAGLIERO
and JOHN PAGLIERO, Doing Business as
TECHNICAL PORCELAIN & CHINA-
WARE CO., and ANTONE PAGLIERO,
MARY JEAN PAGLIERO and DELINA
PAGLIERO, Doing Business as PYRAMID
ALLOY MANUFACTURING CO.,

Defendants.

JUDGMENT

Plaintiff's Motion for Preliminary Injunction having come on for hearing upon the verified Complaint, affidavits, certain physical exhibits and testimony in open court and the Court having filed its Findings of Fact and Conclusions of Law, for the purposes of plaintiff's aforesaid Motion for Preliminary Injunction, it is hereby ordered.

1. That plaintiff, Wallace China Co., Ltd., is a corporation organized and existing under and by virtue of the laws of the State of California and has an established place of business at Huntington Park, Vernon County of Los Angeles, California adjacent the City of Los Angeles.

2. That the defendants, Antone Pagliero and Arthur Pagliero, are residents of the Northern District of California and, with John Pagliero, a resident of the said district, are general partners doing business as Technical Porcelain and China-ware Co., with an established office and plant at 6416 Manila Avenue, El Cerrito, Contra Costa County, State of California.

3. That this Court has jurisdiction of this cause and of the parties under the Lanham Act, 15 USCA, Secs. 1051-1127 and under the Paris Convention and under the Inter-American Convention.

4. That as between the parties hereto plaintiff is the owner of the trade names or trade-marks "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" as used upon hotel chinaware.

5. That as between the parties hereto plaintiff is the owner of the hotel chinaware patterns indicated by plaintiff by the trade names or trade-marks "Shadowleaf," "Tweed," "Hibiscus," and "Magnolia" and exemplified by Exhibits 3, 9, 11 and 13 appended to the Motion for Preliminary Injunction.

6. That defendants have competed unfairly with plaintiff and have infringed plaintiff's trade names or trade-marks.

7. That plaintiff's Motion for Preliminary Injunction be and the same is hereby granted as to the defendants, Antone Pagliero and Arthur Pagliero, general partners doing business with John Pagliero as Technical Porcelain and Chinaware Co.

8. That a writ of preliminary injunction issue out of and under the seal of this Court enjoining the defendants, Antone Pagliero and Arthur Pagliero, and each of them, their agents, representatives, attorneys, servants and those persons acting in privity, participation, and concert with them who receive notice of this judgment by personal service or otherwise, from infringing plaintiff's rights in any manner and from making and causing to be made, selling, offering for sale, advertising, exhibiting, marketing or otherwise disposing of china bearing patterns deceptively similar to those originated by plaintiff, said patterns being exemplified by Exhibits 3, 9, 11 and 13 of record in this action, and from using plaintiff's trade names or trade-marks "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" in the identification of hotel chinaware manufactured and sold by the defendants.

9. That pursuant to Rule 65 of the Federal Rules of Civil Procedure, plaintiff is hereby required to file a bond in the amount of \$3,000.00 as a condition precedent to the issuance of the preliminary injunction herein granted.

Dated June 20, 1951.

/s/ EDWARD P. MURPHY,
United States District Judge.

Acknowledgment of Service

Receipt of a copy of the foregoing Judgment is hereby acknowledged this 20th day of June, 1951.

/s/ HENRY GIFFORD HARDY,
Attorney for Defendants.

[Endorsed]: Filed June 20, 1951.

Entered June 21, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE COURT OF
APPEALS FOR THE NINTH CIRCUIT

Notice Is Hereby Given that Antone Pagliero and Arthur Pagliero, Defendants above-named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment entered herein on June 21, 1951.

Attorneys for Appellants:

HAUERKEN & ST. CLAIR,
/s/ HENRY GIFFORD HARDY.

[Endorsed]: Filed June 26, 1951.

[Title of District Court and Cause.]

MOTION FOR SUPERSEDEAS AND STAY
OF EXECUTION PENDING APPEAL

Defendants, Antone Pagliero and Arthur Pagliero, move this Court for an order staying execution of the judgment entered herein on June 21, 1951, including the lifting of the Preliminary Injunction which issued in accordance therewith, pending the appeal by Defendants to the Court of Appeals for the Ninth Circuit, the said Notice of Appeal having been filed June 26, 1951, pursuant to Rule 62(d) of the Federal Rules of Civil Procedure. The Affidavit of Henry Gifford Hardy is filed herewith in support of this Motion.

Respectfully submitted,

HAUERKEN & ST. CLAIR,

HENRY GIFFORD HARDY,

By /s/ HENRY GIFFORD HARDY,
Attorneys for Defendants.

[Endorsed]: Filed June 28, 1951.

[Title of District Court and Cause.]

ORDER GRANTING SUPERSEDEAS

This cause came on to be heard on motion of Defendants, Antone A. Pagliero and Arthur J. Pagliero, pending Defendants' appeal to the Court of Appeals for the Ninth Circuit pursuant to Notice

of Appeal filed herein, and it appearing to the Court that Defendants are entitled to such stay:

It Is Ordered that the execution of and any proceedings to enforce the Judgment entered herein on the 21st day of June, 1951, shall be stayed pending the termination of Defendants' appeal from said Judgment, upon the filing by Defendants and approval of this Court, of a bond in the sum of \$10,000.00 with sufficient sureties, conditioned as required by Rule 73(d) of the Federal Rules of Civil Procedure, and otherwise as required by law.

Dated August 28, 1951.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed August 28, 1951.

[Title of District Court and Cause.]

DEPOSIT IN LIEU OF SUPERSEDEAS BOND

Know All Men by These Presents, that Antone Pagliero, and Arthur Pagliero, doing business as Technical Porcelain and Chinaware Co., have deposited with the Clerk of this Court in lieu of a Supersedeas Bond, the following treasury bonds.

TB. No. 6016F \$5,000.00 2% 1952-54
(Coupons Nos. 14 to 20, both inclusive,
attached.)

TB. No. 5632B \$5,000.00 2% 1952-54
(Coupons Nos. 14 to 20, both inclusive,
attached.)

in total sum of Ten Thousand Seven Hundred (\$10,700.00) Dollars, to be paid to the said Wallace China Co., Ltd., its successors and assigns; to which payment, well and truly to be made, we agree.

Whereas, on the 21st day of June, 1951, in an action pending in the United States District Court for the Northern District of California, Southern Division, between Wallace China Co., Ltd., a corporation, as Plaintiff, and Antone Pagliero, and Arthur Pagliero, doing business as Technical Porcelain and Chinaware Co., as Defendants, a judgment was rendered against said Antone Pagliero and Arthur Pagliero, doing business as Technical Porcelain and Chinaware Co., Defendants, and the said Defendants having filed a Notice of Appeal from such judgment to the Court of Appeals for the Ninth Circuit:

Now, the condition of this payment is such that if the said Defendants, shall prosecute this appeal to effect and shall satisfy the Judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the Judgment is affirmed, or shall satisfy in full such modification of the Judgment and such costs, interest and damages as the said Court of Appeals may adjudge and award, then this obligation and payment shall be void; otherwise to remain in full force and effect.

In consideration of the premises, we hereby consent and agree to all laws, rules and regulations of the United States of America, or any depart-

ment thereof regarding the posting and forfeiture of the United States bonds as surety.

ANTONE PAGLIERO, and ARTHUR PAGLIERO, Doing Business as Technical Porcelain and Chinaware Co.,

By /s/ ANTONE PAGLIERO,
Copartner.

I hereby approve of the foregoing this 30th day of August, 1951.

/s/ EDWARD P. MURPHY,
U. S. District Judge.

Received from Technical Porcelain & Chinaware Co., a copartnership, thru Antone Pagliero, partner, the following Treasury Bonds, deposited in lieu of other surety on the supersedeas bond in the above-entitled case:

One \$5,000.00 2% Treasury Bond, 1952/54, #6016F
Coupons 14 to 20.

One \$5,000.00 2% Treasury Bond, 1952/54, #5632B
Coupons 14 to 20.

August 30, 1951.

C. W. CALBREATH,
Clerk.

[Endorsed]: Filed August 30, 1951.

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 30595

Before: Hon. Edward P. Murphy, Judge.

WALLACE CHINA CO., LTD.,

Plaintiff,

vs.

ANTONE PAGLIERO, et al.,

Defendant.

REPORTER'S TRANSCRIPT

ORDER TO SHOW CAUSE

Appearances:

For the Plaintiff:

CASIMER A. MIKETTA, ESQ., and
JAMES NAYLOR, ESQ.

For the Defendant:

HENRY GIFFORD HARDY, ESQ.

June 7, 1951, 10:00 A.M.

The Clerk: Wallace China Company versus
Pagliero, order to show cause.

Mr. Miketta: Ready, your Honor.

Mr. Hardy: I did not answer ready, your
Honor. I am here representing two of the defend-
ants, the only two of the defendants who have been
served in this case, Mr. Antone Pagliero and Mr.

Arthur Pagliero. We were served with a great mass of papers, points and authorities, and a motion to show cause, which was set by your Honor for this morning. As your Honor, an order such as this is an attempt to try the case on the basis of affidavits without the opportunity of cross-examination. I thought when I received these papers that it involved trade-mark infringement and coupled with that a charge of unfair competition. In checking into this in a preliminary way I was not aware of the case in the Ninth Circuit which is principally relied upon by the plaintiff in this case as to jurisdiction, and without which even they would agree there could be no jurisdiction of this case. That case changed all of the jurisdictional requirements in cases of this kind. It is the one case I know of on the subject under the Lanham Act, and it would take some very careful searching, and I simply have not had time to meet these issues fairly and learn all the facts involved. [2*]

The affidavits that were filed in here all involve persons who reside in Los Angeles, and when we were served with these papers I asked Mr. Antone Pagliero to go to Los Angeles. He got back from Los Angeles yesterday morning, and in talking with him I knew we could not be adequately prepared to meet these issues this morning, and so I telephoned Mr. Naylor and asked for a reasonable extension of time. Mr. Naylor is not in control of this litigation, and he had to telephone to Los Angeles to relay my request for an extension of time. That request was not granted except with strings at-

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

tached to it that we accept a temporary restraining order without bond until the date of the hearing. That, of course, as your Honor knows, affords me no opportunity to accept an extension of time under those conditions because I do not even believe the Court could grant an injunction or a temporary restraining order in this case properly, and I think as soon as the facts are developed, the Court will agree with me. I do feel that we should have adequate time to prepare for this. Obviously looking at this mass of pleading, and twenty-four pages of authorities cited, that was not prepared in any five days. They had been working on this for some time. We have not had an opportunity to meet these things, and I think that in fairness to my clients and in fairness to the Court, to be able to present these matters, we should have reasonable time to do this. [3]

Now, another thing: In order to show cause like this for a temporary restraining order is really a trial on affidavits. I do not believe Your Honor should hear this thing on affidavits. I think the witnesses ought to be here and subject to examination.

Another thing that my investigation so far indicates is that the only allegation in the complaint, the only support in the affidavits for any urgency in this matter at all is that the defendants may or intend to exhibit the subject matter at a show in Houston, Texas. in the month of June. I have those two men in Court and they will swear under oath that they did not know of this show. They have no

intention of exhibiting in this show and it is too late now to secure any space to exhibit their wares in this show. So it just takes out any urgency in this case.

Another point is I think there are grounds for dismissing this cause of action. In other words, I am entitled to have time to present those facts, and I am entitled to be heard by the Court. That time has not elapsed. I intend to make such a motion. I certainly do not think in the lack of any urgency—this is just like any other trade-mark case or any unfair competition case. There is no other urgency than the one thing that I have stated, the allegation that is the intent to exhibit in the show, and I think that allegation is made in paragraph ten of the plaintiff's motion for preliminary injunction [4] and I would like to read that to Your Honor. It is alleged there that, "time is of the essence because important exhibitions and shows are to be held in the near future at which plaintiff and defendants intend to exhibit their wares. Numerous buyers attend these shows. Defendants should be restrained from unfairly diverting the fruit of plaintiff's good will at these shows and thereby appropriating business which belongs to plaintiff." Then it refers to the affidavits of Mr. Wood, Mr. Delany and Mr. Clifford. If you will refer to those affidavits they refer only to the Texas show which is to be held in June and the San Francisco show, which is to be held in September or October, as I understand it. So there is absolutely no urgency in this case and no reason a preliminary injunc-

tion should issue, and there is no reason why this case should not proceed in the normal manner as any other case.

Mr. Miketta: May I be heard, Your Honor?

The Court: Yes.

Mr. Miketta: In the first place, the two persons actually served are the two primary partners of a three-partner business. The third partner, who happens to be the father, is apparently out of town and could not be located, so that the two partners have been served.

In order that Your Honor know what we are talking about, the plaintiff is engaged in the manufacture and sale of hotel china. One of these happens to be the plaintiff's and the other [5] happens to be the defendant's (exhibiting chinaware). They are sold under exactly the same trade name. Both of them are called "Shadowleaf." The exhibits attached hereto include photostatic copies (and I have the originals if Your Honor wants to look at them), of the price lists published by the defendants, calling these by the name "Shadowleaf" and others by their respective trade names of "Tweed," "Hibiscus," and "Magnolia." In addition to that the defendants, as shown in the affidavits and the exhibits, marked the containers with the trade names, so that there is trade-mark infringement here. A trade-mark represents good will. Good will and reputation take time to build up. The plaintiff has built up a good will and a reputation in its products. That reputation is being irreparably injured, Your Honor, by copies, by the sale of dishes

which not only look alike but are called by the same name. That reputation can be destroyed very, very quickly, particularly at these exhibitions and shows. One of them is in Texas, another will be in San Francisco next month, I believe towards the end of July.

A reputation once destroyed, once damaged, may never be regained sometimes, particularly in view of the fact that in this case, I submit to Your Honor, the defendants have had adequate time to prepare because they were given registered mail notice over a month ago. Mr. Hardy replied and acknowledged and asked for some additional information on May 9th, which I gave [6] him on May 11th, so that since the first part of May they have been on notice. This particular order to show cause was filed a week ago—yes, eight days ago—and it is novel, Your Honor, that at this time, although Mr. Hardy is asking for a continuance, he does not deny a single of the essential allegations upon which we are entitled to an injunction. We have only received this additional urge, you may say, to insist on a preliminary injunction and that is this: Mr. Wood's affidavit, who happens to be the plaintiff's president, states that Mr. Pagliero, the active partner of plaintiff, has threatened to flood the market with these copies and to sell them at a ridiculously low-cost figure unless we laid off, as he put it. Now, that is a statement in the Wood affidavit and I will read it to your Honor. Apparently counsel just ignores it, but there is on page D-7, because I have numbered the affidavits

by letters. D is for Wood, page 7, the last page.

“Deponent states that Antone Pagliero, general partner of Tepco, has been notified of his said unlawful copying of Wallace China, Ltd., patterns and trade names, but refused to cease said acts of infringement and unfair competition and, instead, has personally told the deponent that in the event Wallace China Company, Ltd., were to bring the suit against Tepco, Tepco would drastically reduce prices on the copied patterns of china with the purpose and intent to thereby prevent Wallace China [7] Co., Ltd., from being able to sell its china at a reasonable profit.”

And incidentally, by doing so, Your Honor, he would just wreck, irreparably damage and injure the reputation, the good will, the meaning which these particular patterns, and trade names have acquired in the trade.

I am not going into the merits, but it seems to me at this time, Your Honor, that the affidavits are before you. The affidavits very clearly and definitely show, with exhibits—and I am willing to introduce physical exhibits, Your Honor, to supplant the photostats—that there has been trademark infringement, there has been copying of the appearance of this china—and incidentally, all china is sold by appearance—there has been damage, and everything that is necessary is here. The authorities clearly and definitely show that in a case of this sort the Court will find fraudulent intent, because

with the entire dictionary available, why do they choose the same trade names? With artistry available to others, why do they copy our patterns? Only for the purpose of depriving the plaintiff of its business, of reaping the benefits where they have not sown, and of the damaging our good will and reputation and business, as it has already been damaged, Your Honor.

We feel that it is essential that a preliminary injunction issue, particularly in view of the threat by the partner of [8] plaintiff, and the authorities very clearly and definitely show that injunctions should be granted by the Courts in cases of unfair competition and trade-mark infringement as here. Perhaps Your Honor would like to glance at two pages of the authorities.

Mr. Hardy: May I interrupt? I presented here a motion for continuance, and as Your Honor knows, I did not argue any of the merits.

The Court: I will dispose of that right now. You have had notice of this litigation, or at least there was about to be pending some sort of litigation, in the event this matter could not be disposed of since the early part of May; is there any denial of that?

Mr. Hardy: They gave the formal notice of infringement. I wrote back and asked for further information. That information that I requested there was, "Are these trade-marks registered? Are the designs either copyrighted or otherwise protected by design patent?" They wrote back and said the names were not registered. They have no stand-

ing here in Court whatever. The designs were not protected by copyright or design patent, and normally this Court would not have jurisdiction of such a subject matter. Now, the only possible reason that the Court has jurisdiction here at all—and I do not think Mr. Miketta will deny this a bit—is the reasoning of the Court of Appeals for the Ninth Circuit in the case [9] of Stauffer versus Exley. Stauffer versus Exley is the leading case and the controlling case. It is the only case in the country of its kind. It completely abolishes every rule of jurisdiction over such matters.

Mr. Miketta: Oh, no, Your Honor.

The Court: Well, let us dispose of the continuance first. I am going to deny the motion for continuance. If you wish to proceed at this time, you may do so. Let us get into the merits of your petition.

Mr. Hardy: Then I would like, if Your Honor is requiring me to proceed at this time, to file the affidavits in this case that have been prepared when I was refused the courtesy of an extension of time by counsel.

The Court: They may be filed.

Mr. Miketta: That did not come until yesterday morning, Your Honor, and I was already on my way.

Mr. Hardy: You were not on your way then and you know it.

Mr. Miketta: No; not physically, but I was closing up my office to get out.

Mr. Hardy: I would like to file at this time the

affidavit of Arthur Pagliero, and I will give counsel two copies of the same. Does the Court require an extra copy?

The Court: One copy is enough.

Mr. Hardy: Also I would like to file at this time an affidavit of Antone Pagliero as a partner in one defendant, [10] Technical Porcelain & Chinaware Company. I delivered to counsel two copies of this affidavit. And a third affidavit, which is also by Mr. Antone Pagliero as a partner in Pyramid Alloy Manufacturing Co., and I am delivering to counsel two copies of that.

There is one preliminary matter I should like to take up first, Your Honor, and that is involved in the affidavit of Antone Pagliero on behalf of Pyramid Alloy. Pyramid Alloy is a partnership. The partnership has not been dissolved but it has ceased to do business, and the trade was notified by the letter which is attached to it and marked Exhibit A. There is no reason at all for the Pyramid Alloy partnership being involved in this litigation whatever. It is not doing any business. It has not sold any of the products, and I have Mr. Pagliero here to state that fact and confirm it, and he can be subjected to cross-examination if Your Honor desires.

The Court: What is your disposition with respect to that, Mr. Miketta?

Mr. Miketta: May it please the Court, the reason we included the Pyramid Alloy Manufacturing Company is that we have and our dealers have received price lists bearing the name "Pyramid

Alloy Manufacturing Company of El Cerrito, California." They are located at the same address. These were received as late as February 26, 1951, and they carry on them the same trade name which we find on other price lists published by the [11] defendants.

These alleged price lists, apparently simply have a small piece of paper pasted over the name "Pyramid Alloy." Out of an abundance of caution, and in view of the fact that these people are still sending out literature as late as February, 1951, with these trade-marks, we felt that they should be included as parties defendant, seemingly being a sales company as opposed to the Technical Porcelain & Chinaware Company as being a manufacturer.

The Court: The exhibits have to do with the retarding of sales. They, like many others, have found it necessary to reduce forces and eliminate that which is not absolutely necessary, and they are removing the Pyramid Alloy Manufacturing Company as of August 1, 1949, is that correct?

Mr. Hardy: That is correct, Your Honor, and I can explain this: These stickers are for placing over that Pyramid Alloy name on these price lists. They are using up their old price lists, to be sure. Any that got out without that ticker on them are pure accident, and we do not know of any. So far as we know no one has removed them, or no one has sent out any of these price lists without the stickers.

Mr. Miketta: May the Court please, in order to simplify it, perhaps Your Honor would consider granting the motion to dismiss as to Pyramid Alloy

Manufacturing Co., subject to reinstatement in the event findings or proof indicate they are [12] still in business, as we believe they are.

The Court: Is that satisfactory?

Mr. Hardy: Do you include the individuals with it?

Mr. Miketta: It is a partnership. Dun & Bradstreet reports show they are still in business.

Mr. Hardy: That is not the fact, and I am telling Your Honor, what the fact is.

Mr. Miketta: Subject to your explanation, and subject to reinstatement in the event the facts prove otherwise.

Mr. Hardy: That is perfectly satisfactory.

The Court: It will be dismissed as to Pyramid Alloy Manufacturing Co., subject to this condition, that if the facts prove otherwise, that they are in business, they may be reinstated as parties defendant.

Mr. Miketta: Thank you, Your Honor.

Mr. Hardy: In the very brief time I have had to analyze this mass of paper, including the complaint, the exhibits, and the motion for temporary restraining order I have analyzed as best I could the alleged acts of unfair competition which are set forth in these documents. I have stated to Your Honor that counsel admits that the trade-marks involved in this case, which are, one, "Shadowleaf"; two, "Tweed"; three, "Hibiscus"; and four, "Magnolia," are not registered either in United States Patent Office or the State of California. Plaintiff alleges ownership of these trade-marks, and it

charges [13] that these trade-marks have been infringed by the defendant 'Technical Porcelain & Chinaware Co., which I will refer to as Tepco, Your Honor, to save that mouthful of words on chinaware. Now, since these marks are not registered, there is no *prima facie* ownership in the plaintiff. These words, and particularly the words, Hibiscus and Magnolia, are entirely descriptive. They describe the designs. Here is a sample. That is not produced as an exhibit in the plaintiff's case, but that design, Your Honor, is just merely a reproduction of what it is, a hibiscus, a hibiscus blossom. It is not capable of exclusive appropriation. That is a Tepco product. There is the Magnolia pattern. That is just what it says a magnolia blossom. It is not capable of exclusive appropriation by anyone. So as to ownership, there is no *prima facie* ownership of any of these marks in the plaintiff, therefore there is a very heavy burden of proof to show ownership which goes far beyond any supposed adoption and use of it.

Before I leave the trade-mark infringement point, I want to call Your Honor's attention to a decision by Judge Roche, with which undoubtedly Your Honor is familiar. It is the case of Dollcraft versus Nancy Ann Storybook Dolls. In that case both of the parties, the plaintiff and the defendant, made dolls. The defendant was in a stronger position in this case because it has registered trade-marks for these dolls on names Little Red Riding-hood, Little Bo-Peep, Little Miss [14] Muffett, Mistress Mary, Curlylocks, Goldylocks, and such.

Judge Roche held in that case each doll of such name is a manifestation of a fictional character itself whose name served to identify and describe the doll. The name served, too,—I am not quoting now—the name served to identify and refer to the very product itself.

Then Judge Roche goes on, “These names are so applied are descriptive. Their use belongs to everyone, and Nancy Ann cannot be given the right of their exclusive appropriation.” I say these names such as Magnolia, and Hibiscus are names that belong to everyone. They are not capable of specific appropriation.

The Court: Was that case one in which preliminary injunction was sought against the Nancy Ann people?

Mr. Hardy: This decision that I read to you from was on final hearing.

The Court: That was upon the trial of the merits.

Mr. Hardy: That was on the trial of the merits, but the subject matter there was trade-marks which were registered. They are not registered in this case. So it was even a stronger case than that presented by the plaintiff here, and still the Court did not grant any relief because the names themselves were not capable of specific appropriation as trade-marks.

The next thing that is alleged is that plaintiff owns certain designs. These designs are said to be the “Shadowleaf” [15] pattern, a “Tweed” pattern, a “Hibiscus” pattern, and a “Magnolia” pattern.

It is not set out in this motion just how they own those designs, collectively or individually. Ownership at common law can be protected in advance of publication or use. After that there is statutory protection for ownership. The only kind of ownership recognized in designs after or upon publication and use is copyright. None of the plaintiff's designs are copyrighted and counsel admits this. So that the statutory form of ownership is not in this case. The other and only other statutory form for ownership is by design patent. Now, a design patent must be applied for within one year after the first public sale and use. That already has gone by, by the admissions in the complaint. So that not only did the plaintiff not secure ownership of those designs by design patent, but he can't now do so because the statutory period has gone by. So there is no basis for ownership for these designs.

Now, it is elemental that if a design is publicly used, and this or any other form of artistic or literary work goes out without the statutory protection, it then goes into the public domain and is available for everyone. The only other thing that you cannot do after that is to palm your goods off as the make of someone else, and that was not done in this case and it never has been done. There is no allegation that it was done. So there is no ownership in these so-called designs in this case. [16]

The third point of alleged unfair competition is that the defendants have conspired with one another, and that "other" seems to be a little vague. It is identified in certain of the affidavits as a photo en-

graveing house in Los Angeles, and through this other person or firm, I don't know which it is, conspired to use and duplicate the designs that plaintiff claims are being unfairly referred to. Now, there is no substantiation of this in the affidavits whatever. The affidavits of Arthur Pagliero and Antone Pagliero specifically deny each and every detail. There is no statement to the effect, in any of the affidavits, that this so-called employee violated any confidence. That is a requisite for unfair competition. There is no allegation that he even did anything torteious, if you say he did copy it, which he did not, and there is certainly nothing tortious if you say he did copy it, which he did not, and there is certainly nothing tortious in whether the plaintiff knew about the defendant's operations. So there is nothing in these affidavits to support this, and I have here in Court, I believe, Mr. Messerschmitt, who made the rolls on which china is produced for the defendant Tepco.

The fourth and last allegation of unfair competition is that the defendants have copied the color marking and arrangement of plaintiff's shipping containers. The shipping containers are not in evidence. They have taken a photostat of one side of the shipping containers, and they appear as Exhibits 6 and 5. Exhibit 6 is attached to the motion for preliminary injunction, [17] and I believe Exhibit 5 is attached—they are both together. They are attached to the complaint. Now, anyone who can read cannot confuse those two shipping containers. It states very distinctly on Exhibit 6 that it is from Tepco China Company. The rest of the mate-

rial on that page is merely a form to identify what it is in the container, which is commonly used in the trade by all manufacturers. You have to have some means of identifying. It is simply a form. If there is no unfair competition involved in a case like that. The only thing there is where it comes from. On the one hand, on Exhibit 5, it states it comes from the Wallace China Company, which is the plaintiff, and on Exhibit 6, it says that it comes from Tepco China, El Cerrito, California, and that is all.

Now, as I indicated earlier, Your Honor, I think there is a very serious doubt as to the jurisdiction of this case. The case of *Stauffer versus Exley*, 184 Fed. 2d 962, was a decision by our Ninth Circuit under the Lanham Act, and in this case it holds, and I believe for the first time—at least my research to date indicates that it is the only case that so holds—that this Act confers original jurisdiction on the District Court in actions for unfair competition in the absence of diversity of citizenship, where there is no substantial and related claim under copyright patent or trade-mark of laws joined to such actions.

That, Your Honor, is a very sweeping decision. My own [18] feeling is the Court of Appeals was sold a bill of goods and I think, if I had time to research this, I could persuade Your Honor that the Ninth Circuit was sold a bill of goods. I realize that is the law of this case. We have to face it. But I think also in this case, the *Stauffer* case there was a distinguishing feature. In that case the

Stauffer exercise system was involved and the defendant set up a similar course and called it also Stauffer. Now, there is some basis for trade-mark protection there, and I believe that a careful reading of that Stauffer versus Exley case will show that the Court insisted upon some ownership of a trade-mark before it acquired jurisdiction in the case. Now we have no ownership of trade-mark, we have no subject matter which is capable of ownership as a trade-mark. These names belong to the public. The possible exception to that is the trade-mark "Tweed." There is the "Tweed" pattern. That is a Tepco product. Now, that "Tweed" pattern has been used by Tepco prior to 1941, which is more than six years prior to the first date that the plaintiff alleges use and ownership of such a trade-mark, so that their complaint entirely fails with respect to the trade-mark "Tweed." And on the same theory Tepco has a cause of action against the Wallace Chinaware Company for copying the name "Tweed" and copying the "Tweed" design.

If your Honor would care to look at this, I can show you a price list of Tepco porcelain dated April 22, 1941, in which [19] the product Tweed is listed thereon in the next to the bottom item on that price list. I have not had time to have copies of that made; otherwise I would have had copies here present for counsel, and I would be glad to show it to them.

Mr. Miketta: In whose affidavit does that appear?

Mr. Hardy: Mr. Antone Pagliero's.

The Court: I have some other matters to take up, gentlemen.

Mr. Hardy: We heard Mr. Miketta state that I had not denied or I had ignored certain of the allegations in the complaint. And now Mr. Antone Pagliero's affidavit, as well as his brother Arthur Pagliero's affidavit, are complete denials of everything in the complaint, in the affidavits in so far as they have individual knowledge.

I might say I should refer Your Honor's attention to the fact that the two Paglieros and the Tepco Porcelain Company, or the Technical Porcelain & Chinaware Company, are old established businesses, is an old established business. It was founded originally by the father in 1910. Both of these boys were literally born in this business. The Tepco Porcelain Company has its start as such in 1920. Mr. Antone Pagliero, then at the age of 14, went out to sell these hotel china products, and has been in charge of sales almost up to the present time. He has an intimate personal knowledge that is not equalled by anyone on the plaintiff's side. His brother Arthur Pagliero [20] also was literally born in this business. They have been with it as boys. It is a family enterprise. They started in when they were old enough to handle a mould or a piece of clay. Their business has succeeded and prospered accordingly because of their knowledge. It is not a fly-by-night thing.

I would like to refer to Your Honor's attention paragraph six particularly of the affidavit of Mr. Antone Pagliero, wherein he states, "That it has

been common practice in the industry for several firms engaged therein to duplicate or approximate designs and patterns used by another or other manufacturers and that this practice has been followed by Wallace China Company, Ltd., and Tepco as well as the other manufacturers, and that the same or similar code numbers or words are used to designate the particular design; for example, L-100 is recognized throughout the industry as a "Pin Line Decoration," and I have the price list, which I have not had time to reproduce, but which I can show Your Honor, both from Technical Porcelain and Wallace China, to show that that same number has been used for that particular design.

"L-101 is a Marigold Decoration, L-104 is a Green Band and Line." All manufacturers use that. "Tepco identifies its products by such references and so does Wallace China Co., Ltd. While Tepco has never followed the policy of having exclusive distributors, this situation as well as the fact that it is common practice for manufacturers of similar designs such as [21] Tepco "Mohawk" and Wallace Co., Limited's "Del Mar" patterns brought about the writing of the letter dated September 13, 1937, by the then sales manager for Wallace China Co., Ltd., to Smiths Hotel and Bar Supply Co., of San Diego, the said letter being given this affiant by Mr. R. W. Smith of the said Supply Company. The letter clearly recognizes that the copying and simulation of designs for vitrified hotel ware as early as 1937 were so close that the dealer could

mix two lines when filling an order. I have not had a chance to reproduce that letter, Your Honor, but here is the original letter dated September 13, 1937, and in this letter among other things it states—I start in the middle of the second paragraph—

Mr. Miketta: If the Court please, this goes back to 1937. It seems to be totally irrelevant and immaterial to the primary issue here. I do know what is involved in this. Of course, Mr. Pagliero in his affidavit states that in his opinion it is general practice to copy patterns. Well, maybe it is in his opinion, but just because he thinks it is a proper thing to do does not affect the equities here, and what happened back in 1937 in some letter written by a Mason Hooser about something else does not seem to be pertinent. We are taking up Your Honor's time unnecessarily.

Mr. Hardy: Mr. Miketta, do I understand that you do not recognize this as an original letter from the Wallace China Co., [22] the plaintiff in this case, written by defendant's sales manager?

Mr. Miketta: I am not saying that. It may be an original letter.

The Court: His objection is that it is too remote.

Mr. Hardy: I am showing by this letter, Your Honor, it was common practice.

The Court: I will allow you to read it.

Mr. Hardy (reading):

“You were at the time buying another line of china in addition to ours, and we pointed out to you that it would be rather difficult in our

opinion for you to give enough business to both factories to make your account particularly attractive to us. It has been our experience that when a dealer handles both our line and the other line in question, he mixes the two lines when filling orders and this reacts against the reputation of our china by reason of that fact that oftentimes the restaurant man thinks that it is our line that is breaking up so rapidly when in truth it is the other line."

I point that out to Your Honor to show that it was not a copying of the designs that they were complaining about. It was the quality of the merchandise, and that that has been a practice all along.

I have here two pieces of chinaware, this hotel chinaware we are talking about. Those have been in open competition on [23] the market for a long time. One is made by Tepco and the other is made by Wallace. I defy anyone without a microscope to tell me *that* differences in those two designs are.

Now, there is a good reason for having the several businesses in this line of work reproduce designs of another manufacturer or simulate designs of another manufacturer. That is particularly referred to in paragraph eight of Mr. Pagliero's affidavit.

The Court: That is Antone.

Mr. Hardy: Antone Pagliero's.

"Copying and simulation of designs has grown up in the industry because of public demand. For example, a restaurant may be

completely supplied with a design for vitreous hotel ware made by Wallace China Co., Ltd., or any other manufacturer and some dispute or disagreement may arise with the local distributor or dealer for that manufacturer. The customer wants to get lines and ware which will fit in with his then pattern from another source and it may very well be that a dealer or distributor for Tepco would say he could get this order if the pattern can be duplicated or simulated, which is done. The customer and the public are happy because they are not bound to a single source of supply which could hold them up as to price, delivery or any other reason which would make competition impossible. The practice of copying and simulation of designs was well established in this industry and its practice [24] is fully justified and accepted in the trade, with the public getting the benefit. Such copying and simulation of designs in this trade is limited to unpatented and uncopyrighted designs as statutory rights are respected by all manufacturers."

And that is true, Your Honor. The public gets the benefit.

What that plaintiff is asking this defendant to do at this time is to enter into a conspiracy in restraint of trade to help him secure a monopoly on a line of ware and a design to which they are lawfully entitled and to which the industry itself over a period of time has permitted an open and free competition.

Now, the only thing I have not been able to answer in these affidavits is the conspiracy charge. That conspiracy is said to arise from the employment by Tepco of a former employee of Wallace Chinaware. That, I say, is a misrepresentation of the fact. We have Mr. Messerschmitt here in the courtroom. I have not been able to interview him with any degree at all, but I am perfectly willing to put him on the stand now and ask him the questions to deny those statements and state to Your Honor what the facts are.

The Court: All right, put him on.

DALE J. MESSERSCHMITT

was called as a witness on behalf of the defendants, and being first duly sworn testified as follows:

The Clerk: State your name for the record. [25]

A. Dale J. Messerschmitt.

Direct Examination

By Mr. Hardy:

Q. Mr. Messerschmitt, where do you live?

A. Whittier, California.

Q. In Whittier, California. What is your occupation?

A. Photo engraver.

Q. With whom are you associated?

A. The Garnier Engraving Company.

Q. Where are they located?

A. Los Angeles.

Q. Does your photo engraving company, Garnier

(Testimony of Dale J. Messerschmitt.)

Engraving Company, practice any specialty in photo engraving? A. Yes, we do.

Q. What is that specialty?

A. Cylinder engraving.

Q. In other words, you make engravings for the pottery industry?

A. Pottery and Continental Can Industry, and other types of cylinders, too.

Q. Do you hold out your services to entire pottery industry? A. Yes.

Q. Have you ever been employed by the Wallace Chinaware Co.? A. No.

Q. You never have been employed?

A. No. [26]

Q. Have you ever been employed by Tepco?

A. No.

Q. Does the Garnier Engraving Co. make cylinders for the plaintiff, Wallace China Co., Ltd.?

A. Yes, we do.

Q. Does it also make cylinders for other pottery companies? A. Yes.

Q. Could you name one or two of those?

A. Vernon Kilns.

Q. Where are they located, please?

A. Vernon, California.

Q. Any other? A. And Tepco.

Q. You have made cylinders for Tepco, the defendant here? A. Yes, we have.

Q. Have you ever made cylinders for Tepco using other than original art work supplied by Tepco? A. Never.

(Testimony of Dale J. Messerschmitt.)

Q. Have you ever copied a design of any other of your clients for Tepco? A. No, never.

Q. Did the Wallace Chinaware Company teach you your trade? A. No.

Q. You did not learn your trade from the Wallace Chinaware Co?

A. No, we did not. [27]

Q. Did they teach you about cylinder engraving?

A. No.

Q. To your knowledge were they the originators of cylinder engraving methods? A. No.

Q. You know of your own knowledge that that is many years old?

A. Yes, very many years.

Mr. Hardy: I think that is all for Mr. Messerschmitt.

Mr. Miketta: May I examine him?

The Court: Yes.

Cross-Examination

By Mr. Miketta:

Q. Mr. Messerschmitt, do you mean to state that the Garnier Engraving Company has never done any engraving work for Wallace China Company?

A. We have never done work? Yes, we have.

Q. You have? A. Yes.

Q. Over what period of time?

A. I believe since 1944.

Q. How long have you been with Garnier?

(Testimony of Dale J. Messerschmitt.)

A. I came with Garnier in 1941. I went into the service and came back in 1946.

Q. Mr. Garnier is the senior partner, is he not?

A. That is right. [28]

Q. In the manufacture of these cylinders Wallace would bring you a black and white drawing first, is that correct? A. That is correct.

Q. Then that would be photographed and etched onto a metal cylinder, is that correct?

A. Correct.

Q. I hand you a sheet which has been pasted on the backing. Do you recognize that?

A. Yes.

Q. What is that? A. That is a pattern.

Q. Is that a print, you may say, taken from one of the rollers? A. Yes, I would say so.

Q. And you recognize the pattern by name?

A. Yes.

Q. What is it?

A. I would say it is called "Shadowleaf."

Q. Is that the Wallace "Shadowleaf"?

A. No, this is not.

Q. That is not? A. No.

Q. How can you tell the difference?

A. Well, there is enough difference in the work that I can recognize it. There is a back stamp which shows Tepco.

Q. So the word "Tepco" actually appears on that pattern, does [29] it not?

A. That is right.

(Testimony of Dale J. Messerschmitt.)

Mr. Miketta: May I have this marked, please for identification? May it be marked as Plaintiff's Exhibit 1, and should like to offer it in evidence, in view of the fact that it has been identified.

The Court: It may be received.

(The print referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 1.)

Q. (By Mr. Miketta): Mr. Messerschmitt, do you have any idea of when the cylinder from which this print has been made was made by you?

A. Approximately.

Q. When would that be?

A. About near the end of 1949.

Q. About the end of 1949. Prior to that time you had made similiar cylinders of this "Shadowleaf" pattern for Wallace, did you not?

A. Yes.

Q. I show you a transfer sheet, this one being in green, and ask you if you can recognize that?

A. Yes, I can.

Q. Will you please state what that is.

A. That is called a "Shadowleaf" pattern of Wallace's.

Mr. Miketta: May I have that marked, please as Plaintiff's [30] Exhibit No. 2?

(The print referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 2.)

(Testimony of Dale J. Messerschmitt.)

Q. Now, it is customary after the cylinder has been etched to send these cylinders out to the Hard Chrome Company, is that it?

A. That is correct.

Q. And they chromium plate it, is that correct?

A. That is right.

Q. Do you recall that the cylinder that you had made for Tepco was accidentally sent by Hard Chrome Company to Wallace instead of to you or to Tepco?

A. Yes, I recall.

Q. When you lay Exhibit 2, which is the Wallace pattern or the Wallace transfer from a cylinder, over the Exhibit 1, which is the transfer or pattern taken from the Tepco pattern, don't you find that they are practically identical?

A. They are very similar.

Q. I call your attention to the manner in which the leafs along the left-hand edge seem to blend with the underlying pattern on Exhibit 1. Is that just happenstance, Mr. Messerschmitt?

A. Yes, I would say it is.

Q. In your opinion that is happenstance?

A. I would say that a duplication of that pattern is very [31] close.

Q. And this pattern includes the large white leaves?

A. That is right.

Q. Which are arranged similarly, are they not?

A. Right.

Q. And the large white leaves occasionally have little white tendrils as indicated in the lower right-

(Testimony of Dale J. Messerschmitt.)

hand corner and the upper right-hand corner, is that correct, on both of them?

A. That is right.

Q. And in both instances you have a background of diagonal lines, have you not?

A. It has to have a diagonal line. That particular art work calls for that.

Q. In both instances there are background leaves of a darker shade than the farthest background, is that true? A. That is true.

Q. And those background leaves are identical in form and contour on the Tepco, as Exhibit 1, as they are on the Wallace sheet?

A. They are similar in nature, yes.

Q. Do you recall from whom you obtained the master from which you made the cylinder for Tepco "Shadowleaf" pattern, Exhibit 1?

Mr. Hardy: You mean the original art work.

The Witness: The original art work? I believe it was from the Tepco Company. [32]

Q. (By Mr. Miketta): Do you have a clear recollection from whom you received it?

A. It was either the Tepco Company or the artist.

Q. Do you know the name of the artist?

A. Yes, I do.

Q. May I have it, please?

A. William Richardson.

Q. Where does he live?

A. I believe in Los Angeles.

(Testimony of Dale J. Messerschmitt.)

Q. Is he the same Mr. Richardson who was employed by Wallace China Company?

A. I believe he has been, but he has been free-lancing for quite a few years.

Q. But prior to the time that you received the model from which you made the cylinder represented by the transfer, Exhibit 1, you know that Mr. Richardson was employed by Wallace China Company?

A. Free lancing, yes.

Q. And he was employed by them for art work, is that correct?

A. That is right.

Mr. Miketta: I do not see that anything else is to be gained, your Honor.

Redirect Examination

By Mr. Hardy:

Q. I have two or three questions to ask you, Mr. Messerschmitt. I show you a tear sheet from the publication [33] "Pottery and Glass" for January, 1950, and ask you if that illustrates the kind of cylinder to which you referred?

A. Yes, it does.

Q. And it is your job to engrave cylinders of that character?

A. That is right.

Mr. Hardy: I would like to offer this sheet as Defendant's C.

The Court: It may be marked.

(The tear sheet referred to was thereupon received in evidence and marked Defendant's Exhibit C.)

(Testimony of Dale J. Messerschmitt.)

Q. (By Mr. Hardy): You stated that Mr. Garnier was the senior partner of your firm?

A. That is right.

Q. How many partners are there?

A. Two.

Q. Are you the other partner?

A. That is right.

Q. Has Mr. Garnier been active in the business in the past several years? A. Not lately.

Q. By lately, you mean how long?

A. About three years.

Q. You have been making the engravings for the past three years, is that correct?

A. Longer. [34]

Q. Longer than that? A. Yes.

Q. I believe you said that you got the original art work for the Tepco "Shadowleaf" design there from Tepco or from Mr. Richardson?

A. That is correct.

Q. You can't recall which it was?

A. I am not sure.

Q. But you did not get it from Wallace?

A. No.

Q. And you did not use a Wallace roller?

A. No, definitely not.

Q. And you did not supply Mr. Richardson or Tepco with any print of the Wallace cylinder?

A. Definitely not.

Q. You have stated also it was your recollection that Mr. Richardson had formerly been employed

(Testimony of Dale J. Messerschmitt.)

by Wallace Chinaware Co. Do you know what his employment was at that time?

A. He has free lanced for a few of the potteries for the last few years.

Q. So you mean he had free lanced for Wallace Chinaware Company? A. Yes.

Q. As well as Tepco? A. Yes.

Q. As well as other potteries? [35]

A. That is right.

Q. Do you know where Mr. Richardson is now?

A. I believe he is in the East.

Q. Have you tried to contact him at all?

A. Not for several weeks.

Mr. Hardy: Those are all the questions that I have.

Mr. Miketta: I do not think Mr. Messerschmitt is on trial here.

The Court: Step down.

Mr. Hardy: I do not think Mr. Messerschmitt is on trial either. I just want to get the fact to show there is no conspiracy. I think it is very evident from Mr. Messerschmitt's testimony. They certainly have not sustained the burden of proof required by the allegations in their complaint that we had entered into a conspiracy to use the designs of the plaintiff.

The Court: What else have you?

Mr. Hardy: I would like to point out one further thing on this, your Honor. I have not taken up Arthur Pagliero's affidavit in this case, which goes primarily to the quality of the work. The

quality and reputation of the firms I think is a standoff. I do not think anyone could claim any more purity than the other. I think they are both reputable concerns. They have met in competition before, and why this lawsuit was brought about I have no real basic understanding. But I do want to point [36] that the only urgency alleged in this motion for a temporary injunction is the imminency of the exhibition in Texas. That has entirely disappeared. Therefore there is presently no possible basis for the Court granting a temporary injunction prior to the trial of the issue in this case. There isn't any denial of that. They allege only one thing, the imminency of this case. That has been entirely abandoned by Mr. Miketta, and it just washes out completely. So that there is no basis now, no urgency for the granting of this extreme relief, and the tying up of a business in advance of the proof of the facts. I would like at this time in concluding to offer the exhibits that have been referred to during the course of my comments here and that have been referred to in the several affidavits.

The Court: They will be received and appropriately marked.

Mr. Hardy: May I have these marked, your Honor? In the affidavit of Arthur Pagliero he has referred to the overall pattern made by the Mayer China Company of Beaver Falls, Pennsylvania. I think Arthur Pagliero states in his affidavit that that overall pattern has been known and used for many years, and we are attempting now to get the

catalogue and the exact date when that pattern was first used. There is an allegation in here that the overall patterns were invented by Wallace Chinaware. That is sheer fabrication. That is not true, and it can be proved beyond any reasonable doubt. This exhibit I would like to offer as Defendant's Exhibit B. [37]

(The pattern referred to was thereupon received in evidence and marked Defendant's Exhibit B.)

Mr. Hardy: I would like also to offer the Tepco China dish of the Magnolia design which is known as Dixie in the Tepco line as Exhibit D.

The Court: It may be received.

Mr. Hardy: I would like to offer the Tepco plate of the Hibiscus design which is also known as Hawaiian as Defendant's Exhibit E.

(Thereupon the plate referred to was received in evidence and marked Defendant's Exhibit E.)

Mr. Hardy: I would like to offer the Tepco plate with the Tweed design, which our Honor will recall has been sold for over ten years by Tepco, as Defendant's Exhibit F.

(Thereupon the plate referred to was received in evidence and marked Defendant's Exhibit F.)

Mr. Hardy: I would like to offer the Wallace Chinaware cup which is sold under their designation design as Del Mar as Defendant's Exhibit G.

(Thereupon the cup referred to was received in evidence and marked Defendant's Exhibit G.)

Mr. Hardy: I would like to offer in evidence Tepco China design "Mohawk" as Defendant's Exhibit H.

(Thereupon the object referred to was received in evidence and marked Defendant's Exhibit H.) [38]

Mr. Hardy: I would like to offer the original letter of Wallace China Co., Ltd., dated September 13, 1937, as Defendants' Exhibit I and ask leave to substitute photostatic copies thereof, as this is the only I have and I will supply counsel with copies.

The Court: Very well.

(The letter referred to was thereupon received in evidence and marked Defendant's Exhibit I.)

Mr. Hardy: I would like to offer the Tepco discount sheet of April 22, 1941, to which I have referred, as Defendant's Exhibit J.

(The discount sheet referred to was received in evidence and marked Defendant's Exhibit J.)

Mr. Hardy: I would like also to offer the Wallace China Co., Ltd., discount sheet of January 15, 1942, as Defendant's Exhibit K.

(The discount sheet referred to was received in evidence and marked Defendant's Exhibit K.)

Mr. Hardy: And I would like at this time to offer the Federal specification for vitrified china-ware, which defines hotel china, and which is referred to in the affidavits, it being Specification MC 301 a in which, or to which all makes of vitrified china of this character conform.

The Court: It may be received.

(Thereupon the document referred to was received in evidence [39] and marked Defendant's Exhibit L.)

Mr. Hardy: Your Honor, inasmuch as I do not have duplicate of these discount sheets, I would like also to withdraw these and make photostatic copies and substitute a photostatic copy thereof, and I will furnish counsel with copies. They are the only ones we have.

The Court: I want to see those this afternoon.

Mr. Hardy: I mean when you are through with them, your Honor, I would like to withdraw them.

The Court: You may.

Mr. Hardy: That concludes my presentation.

Mr. Miketta: Your Honor, I will try to be as brief as I possibly can. Is your Honor interested in this question of jurisdiction?

The Court: No.

Mr. Miketta: I think that *Stauffer versus Exley* is very clear. Our whole case has been prepared following strictly the requirements laid down by the Ninth Circuit in that case. It is interesting to note that there has been nothing stated in these

affidavits which we have read very carefully which contradict the necessary allegations. They do not contradict that they copied the pattern or the patterns, rather. They can't. They do not deny that they used those names and shipments in interstate commerce—and that is important because it has to be commerce regulated by Congress—whereas our complaint [40] makes the necessary allegations which are substantiated under oath. I do not know the purpose of having Mr. Messerschmitt appear here today except that in our complaint we stated that Garnier, who has made our cylinders for many years, now makes the same cylinder for Tepco. Mr. Messerschmitt admitted it. Exhibits 1 and 2, and your Honor has been able to compare them closely by this time, show that they are identical.

Incidentally, for your Honor's information, after a cylinder is made it is printed on this thin paper in the desired color and then girls cut the piece out and lay it on the chinaware that is to be decorated. Then the chinaware is burned, and during the burning the paper disappears and the color is fixed on the china. That is one of the reasons why they make it. I thought your Honor would be interested in that.

We are not interested in the normal white chinaware, hotel ware with normal painting, the common ordinary garden variety of china that they make, and a lot of people make, and the mere fact that there is a letter written in 1937 about some other china—not these patterns—has nothing to do with this case. White china is white china, but when a

man puts out china which has a distinctive trade name, and which has a distinctive pattern, and that goodwill is developed in the pattern, and then another man comes along and uses the same name and the same pattern, he is stealing, and the Courts [41] have held that to be stealing. So far as names are concerned, they do not like our photostats that are attached to the affidavit in the complaint. The photostats are small reproductions of these actual carton sizes, and your Honor will notice that they have been printed by Tepco in blue in the same arrangement and arranged for marking in the same manner. As a matter of fact, that appears on a large number of packages and appears in the same way. Why did they have to select blue and use the same arrangement? Of course, their name appears on there. That does not save them at all, your Honor.

There is one very fine case in our memorandum. It is on page 12, and I think the language is almost identically applicable. That is Enterprise Manufacturing versus Landers, Frary and Clark, a well written Second Circuit case, and the Court there stated, 131 Fed. 240 et 241, "This is a most aggravated case of unfair trading. Usually in these cases the defendants so dress their goods as to present a number of points of difference, on which they rely when charged with intent to deceive; insisting that, although there may be resemblances, the differences are so great as to preclude any idea that they had sought to produce confusion. Here, on the contrary, they have not only conformed their

goods to complaint's in size and general shape, which was to be expected, but also in all minor details of structure—every line and curve being reproduced, and superfluous metal put into the driving wheels [42] to produce a strikingly characteristic effect—while the goods are so dressed with combinations of color, with decorations reproduced or closely simulated, with style of lettering and details of ornamentation that except for the fact that on the one mill is found the complaint's name, and on the other the defendant's, it would be very difficult to tell them apart. It is elementary law that, when the simulation of well known and distinctive features is so close, the Court will assume that defendants intended the result they have accomplished, and will find an intent to appropriate the trade of their competitor, even though in their instructions to their own selling agents they may caution against oral misrepresentations as to the manufacture of the goods.”

I call attention to that case because we have the word “Wallace” on the back of our plates, and they do——

Mr. Hardy: In all instances?

Mr. Miketta: Except on some small plates.

Mr. Hardy: That is right.

Mr. Miketta: That is not enough. People buy by pattern, by name; they recognize that by name. The trade names have been used as shown by our exhibits on the containers, on the price lists, by word of mouth. They have copied our patterns—I am not going to burden the record with any more

actual plates, but here is a comparison, your Honor. One of these is ours and one of these is theirs. Now, that is a distinctive pattern, and what [43] happened is this: We originated this pattern a good many years ago. Tepco copied it for a while and then gave it up, and did not copy it for a number of years. Recently they have started recopying it, and by golly we are including it in this cause of action because we should, but as far as origination is concerned, we originated that pattern. There is not a single denial in any of these affidavits that we did not originate these patterns, except that generalized statement that everybody copies patterns that we did not originate the general idea of having an overall pattern, which I think is a little beside the point.

A preliminary injunction should be granted, your Honor, because trade-marks, trade names, reputation, goodwill are at stake here, and we do have the verified—will, Mr. Wood's affidavit not denied by the defendant that Mr. Pagliero did threaten the plaintiff with flooding the market with these copies at a greatly reduced price if we brought this action. Now, that statement was made before, but after notice had been given them.

Mr. Hardy: When was that statement made, Mr. Miketta?

Mr. Miketta: That statement was made prior to May 25th, which is the date of the Wood affidavit.

Mr. Hardy: Subsequent to when?

Mr. Miketta: Pardon?

Mr. Hardy: Subsequent to when? [44]

Mr. Miketta: Subsequent to the time that we sent the notice on May 5th. Your Honor, we have those expositions coming up. We have this threat of flood of copies. We have my client's reputation, and as the Courts have pointed out, reputations are easily broken, and preliminary injunctions are about the only way you can save them. They are doing exactly what this Court stated—this is the Sixth Circuit—in *Garrett and Sons versus T. H. Garrett and Co.*, 78 Fed. 472 et 479, "If the complaints be not protected by preliminary injunction against such use—in other words, that question be postponed to the final hearing—there is every inducement to the defendant to delay and prolong the litigation, continuing meanwhile the assaults upon the goodwill of the complaints, so that, even if final decree be at last rendered in favor of complaints, the goodwill will have been so seriously and irreparably injured, if not to a great measure destroyed, as to leave the complaints practically without remedy."

We are in that position. Unless we get a preliminary injunction, and the proof is before your Honor—the proof is clear; it is definite, and there is no denial of the essential fact—if we do not get this preliminary injunction, then the defendant, as he has already tried to this morning, will delay and prolong the litigation, and in the meantime our goodwill, our reputation, the value of our trademark, the value of these patterns will have been destroyed. [45]

The Court: All right, gentlemen. The Court is

apprised of the situation. I will get at this as soon as I can this afternoon.

Mr. Miketta: Thank you, your Honor. I think the authorities have been well presented by the memorandum.

Mr. Hardy: Your Honor, may I ask your indulgence for just a moment? We have not answered in detail this so-called threat because in the pleadings it does not say when the threat was made. For the first time, just a few moments ago, we learned from Mr. Miketta that it was made or said to have been made between May 5th and May 25th of last month. I have Mr. Pagliero here, who will deny that, and deny that he saw Mr. Kenneth A. Wood.

Mr. Miketta: He did not see him. He telephoned him. That was by telephone.

Mr. Hardy: Is there a recording of that telephone conversation?

Mr. Miketta: May the Court please, those are the tactics that are going to be used——

The Court: I will assume if you put him on the stand he would deny it.

Mr. Hardy: I would like to do so, your Honor, because it is not true.

Mr. Miketta: I would like to have him confronted by Mr. Wood. [46]

The Court: I do not know about that. I say I would assume if you put your client on the stand he would deny it.

Mr. Hardy: As an honorable person under oath he would tell the truth.

The Court: I am not saying he would or would not.

Mr. Hardy: So I resent Mr. Miketta's inferences here that Mr. Pagliero was not an honorable person.

The Court: The Court did not get any such inference. I am not assume Mr. Pagliero is a dishonorable man. There has been nothing to suggest that here. The Court does not take any such inference. I am only concerned with the legal issue. I am not concerned with personalities or anything else; I am only concerned with what I am confronted with here, and you have both very ably and proficiently apprised me of the problem I have before me, and the matter will now stand submitted.

(Whereupon the matter was submitted.)

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 47 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ JOSEPH J. SWEENEY.

[Endorsed]: Filed September 17, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled matter and that they constitute the record on appeal herein as provided in the designation filed by the attorneys for the appellant:

Complaint for unfair competition and Trade Mark Infringement.

Motion for preliminary injunction.

Order to show cause.

Affidavit of Antone Pagliero (re Pyramid Alloy Mfg. Co.).

Affidavit of Arthur Pagliero.

Affidavit of Antone Pagliero.

Order dismissing action as to Pyramid Alloy Mfg. Co.

Order for preliminary injunction.

Findings of Fact and Conclusions of law.

Judgment.

Notice of appeal.

Motion for supersedeas and stay of execution.

Order granting supersedeas.

Supersedeas bond.

Appellants' designation of record on appeal.

Reporter's transcript (witness Dale J. Messerschmitt).

Concise statement of Points of Appeal under Rule 75 (a).

Plaintiff's Exhibits 1 and 2.

Defendants' Exhibits B to L.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 6th day of September, 1951.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. W. CALBREATH,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the accompanying documents, to wit: Reporter's Transcript, June 7, 1951, and Plaintiff's counter-designation of contents of record on appeal, are the originals filed in this Court in the above-entitled case and that they constitute a supplement to the record on appeal herein.

In Witness Whereof I have hereunto set my

hand and affixed the seal of said District Court this 19th day of September, 1951.

[Seal]

C. W. CALBREATH,
Clerk.

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13094. United States Court of Appeals for the Ninth Circuit. Antone Pagliero and Arthur Pagliero, Appellants, vs. Wallace China Co., Ltd., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed September 12, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13,094

ANTONE PAGLIERO, et al.,

Appellants,

vs.

WALLACE CHINA CO., LTD.,

Appellee.

CONCISE STATEMENT OF POINTS UPON
WHICH APPELLANTS INTEND TO RELY

Pursuant to Rule 19(6) of this Court, Appellants herein below set forth a concise statement of points upon which they intend to rely in this appeal.

1. The Court erred in finding and holding that Plaintiff is the owner of the trade names or trade-marks "Shadowleaf," "Tweed," "Hibiscus," and "Magnolia," as applied to hotel china and is entitled to the exclusive use thereof as against these Defendants, although none of them has been registered under any Federal Act or under the Laws of the State of California, and in spite of the complete failure to show they were anything other than descriptive designations for designs.

2. The Court erred in finding and holding that the Plaintiff is the owner of the distinctive patterns identified by the trade names or trade-marks "Shadowleaf," "Tweed," "Hibiscus," and "Magnolia" exemplified by Exhibits 3, 9, 11 and 13 ap-

pended to the motion for preliminary injunction, and is entitled to the exclusive right to incorporate said patterns in hotel china as against these Defendants, although none of said patterns has been copyrighted or protected by Design Letters Patent, and the time for doing so has long since passed.

3. The Court erred in finding and holding that the Court had jurisdiction of this cause under the Lanham Act 15 USCA Sections 1051-1127, and under the Paris Convention and the Inter-American Convention.

4. The Court erred in finding and holding that the Defendants by manufacturing, advertising and selling hotel china under the trade names or trademarks "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" have infringed Plaintiff's rights therein and have competed unfairly with Plaintiff.

5. The Court erred in finding and holding that the Defendants by copying and imitating Plaintiff's patterns identified by the trade names or trademarks "Shadowleaf," "Tweed," "Hibiscus," and "Magnolia" and exemplified by Exhibits 3, 9, 11 and 13, of record herein, and by manufacturing and selling hotel china incorporating the same, have competed unfairly with the Plaintiff.

6. The Court erred in finding and holding that the Plaintiff is entitled to a preliminary injunction against the Defendants as prayed.

7. The Court erred in finding and holding that the Defendants are guilty of unfair competition even

though there is no passing off of Defendants' products as and for Plaintiff's products and even though the products of both Plaintiff's and Defendants' are clearly marked, each with its own trade-mark and even though it has long been the practice in the industry for manufacturers to copy or simulate designs used by other manufacturers, unless said designs are either protected by Design Letters Patent or copyrighted.

Respectfully submitted,

/s/ HENRY GIFFORD HARDY,
Attorney for Appellants.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 14, 1951.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER DESIGNATING
EXHIBITS TO BE PHYSICAL EX-
HIBITS FOR THE RECORD ON APPEAL

It is stipulated by and between the parties hereto through their respective counsel that the following exhibits, whether documentary or physical, need not be reproduced but shall be available as physical exhibits to the Court in connection with this record and may be considered by the Court in their original form as if they had been reproduced in

the printed record, said exhibits being as follows:

Plaintiff's Court Exhibits 1 and 2.

Defendants' Exhibits B to L, both inclusive.

C. A. MIKETTA,

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By /s/ JAS. M. NAYLOR,

Attorneys for Appellee.

HENRY GIFFORD HARDY,

HAUERKEN & ST. CLAIR,

By /s/ HENRY GIFFORD HARDY,

Attorneys for Appellants.

So Ordered:

/s/ WILLIAM DENMAN,

Chief Judge.

/s/ WILLIAM HEALY,

/s/ HOMER BONE,

United States Circuit Judges.

[Endorsed]: Filed September 18, 1951.

No. 13,094

IN THE
United States
Court of Appeals

For the Ninth Circuit

ANTONE PAGLIERO and ARTHUR PAGLIERO,
general partners doing business as
Technical Porcelain & Chinaware Co.,
Defendants-Appellants,

VS.

WALLACE CHINA Co., LTD., a Corporation,
Plaintiff-Appellee.

APPELLANTS' OPENING BRIEF

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No. 13,094

IN THE
United States
Court of Appeals
For the Ninth Circuit

ANTONE PAGLIERO and ARTHUR PAGLIERO,
general partners doing business as
Technical Porcelain & Chinaware Co.,
Defendants-Appellants,
vs.

WALLACE CHINA Co., LTD., a Corporation,
Plaintiff-Appellee.

APPELLANTS' OPENING BRIEF

This is an appeal from an interlocutory judgment (R. 89) of Judge Murphy granting a preliminary injunction *pendente lite* following an *ex parte* Order to Show Cause (R. 63) served with the complaint in a suit for alleged trademark infringement and unfair competition brought by Plaintiff-Appellee against Defendants-Appellants (R. 3). Judgment was entered herein upon findings of fact and conclusions of law (R. 83-88).

JURISDICTION

It is claimed by Plaintiff-Appellee (R. 4) and found by the District Court (R. 86), but denied by Defendants-Appellants, that the District Court has jurisdiction of this cause under the Lanham Act, 15 U.S.C.A. § 1051-1127, under the Paris Convention, and under the Inter-American Convention. Appellate jurisdiction of this Court is based upon 28 U.S.C.A. § 1292. Judgment was entered by the District Court on June 21, 1951 (R. 92) and this appeal was taken June 26, 1951 (R. 92), within the statutory period. Although suit was brought for trade-mark infringement, no trade-mark is alleged to be infringed and, indeed, it is freely admitted that Appellee's notations are not registered trade-marks (R. 104, 108) and the Court so found (R. 84). Does the Lanham Act provide jurisdiction for infringement of unregistered trade-marks, is a question and issue on this appeal. Since there is no diversity of citizenship (R. 3), one of the fundamental questions here raised is whether the District Court had jurisdiction to enter judgment and grant the preliminary injunction in a case involving a naked claim of unfair competition, where there is no substantial and related claim under the copyright, patent or trade-mark laws.

STATEMENT OF THE CASE

The Parties

Defendants-Appellants, Antone Pagliero and Arthur Pagliero, are general partners in a partnership known as Technical Porcelain & Chinaware Co., which is also known as TEPCO (R. 68, 74, 27, 41). For convenience the Defendants-Appellants shall hereafter be referred to as

Tepco. Both the individual Defendants-Appellants and the partnership are residents of the Northern District of California, Southern Division (R. 68, 74). They manufacture (R. 72) and sell table chinaware known as vitrified hotel chinaware to jobbers and dealers *only* (R. 75).

Plaintiff-Appellee, Wallace China Co., Ltd., is a corporation having its principal place of business at Huntington Park, County of Los Angeles, California (R. 3). For convenience Plaintiff-Appellee shall hereafter be referred to as Wallace. It, likewise, manufactures and sells vitrified hotel chinaware (R. 4, 37) to dealers (R. 38).

There is no diversity of citizenship in this case.

Subject Matter

The vitrified hotel chinaware made by both Tepco and Wallace is substantially identical as to physical properties as both are made to conform with Federal specifications (R. 72) for vitrified chinaware as set forth in Specification NC-301a (Defs. Ex. L). Likewise, they are made in substantially identical shapes, sizes and forms. The substantial identities of the physical properties, the form, the sizes, and shapes of this chinaware are not involved in any charge brought by Wallace, except that Wallace says Tepco products are inferior in quality. Obviously, the Federal specifications do not set a standard of inferior quality.

Two separate and distinct causes of action are jumbled together in the complaint and not separately stated as preferred under the rules (F.R.C.P. 10, Sec. (b)), although such confused pleading is permitted (F.R.C.P. 8(e) (2)). The confusion resulting from inexorably mixing two separate and distinct alleged claims tends to confound the Court and Tepco. The jurisdictional allegations of the

complaint very precisely state that there are two causes of action, one for trade-mark infringement (R. 4), and the other for unfair competition (R. 4), but the remainder of the complaint makes no separation whatever. Accordingly, it is constantly necessary to sort out the allegations directed to the alleged Federal claim for trade-mark infringement and those allegations directed to the alleged Federal claim for unfair competition.

The Alleged Federal Cause of Action for Trade-Mark Infringement

Neither in the complaint, nor in any of the papers filed by Wallace in connection with the Order to Show Cause, is there any allegation of trade-mark infringement. The words claimed by Wallace are alleged to be "trade names" *not* trade-marks. The Court found that *no registered trade-mark is involved* (R. 84). The names which Wallace alleges have been unlawfully appropriated by Tepco, "Magnolia," "Hibiscus," "Tweed" and "Shadowleaf," are only names used to identify patterns or designs used by Wallace to decorate its china (R. 39, 7, 21, 24). Even Wallace and its attorneys do not have the temerity to call these names "trade-marks," but instead refer to them as "trade names." This distinction made by Wallace, with full specialized knowledge of the law, has an important bearing not only upon the jurisdiction of the Court but also upon whether or not a cause of action for trade-mark infringement has been stated.

The Alleged Federal Unfair Competition Cause of Action

The charge of unfair competition specifies three separate and distinct matters of Defendants' conduct: (1) that Tepco

has appropriated four certain designs used by Wallace to decorate its china (R. 7); (2) that Tepco has conspired with the engraver who prepared the engraving rolls for Wallace, and had him copy the engraved rollers made for the Wallace designs (R. 7); (3) that Tepco has copied the color, marking, and arrangement of the Wallace shipping cartons (R. 8). The acts alleged in (2) and (3) above were not seriously urged by Wallace and there is no finding by the Court on either of these allegations.

There is not now and never has been any charge or claim that Tepco passed off any of its products as and for those of Wallace and, on the contrary, it affirmatively appears that each piece of such chinaware manufactured by Wallace bears its registered trade-mark "Wallace" (Plf. Ex. 1) and that each piece of Tepco ware bears its trade-mark "TEPCO" (Plf. Ex. 2, Defs. Ex. D to H; R. 72, 79). These are the trade-marks which identify each manufacturer as the source or origin of the products, and these trade-marks are placed in the location established by custom and used by china manufacturers for many years (R. 73-79). The so-called Wallace trade names "Magnolia, "Hibiscus," "Tweed" and "Shadowleaf" do not appear on the products.

It was alleged by Tepco and not denied, that it is the custom and common practice of manufacturers of chinaware to duplicate, simulate, and approximate designs used by other manufacturers in the decoration of chinaware (R. 76, Defs. Ex. G and H). The practice, however, does not extend to patterns protected by Design Patents, which give the owners a limited monopoly. The reason for the practice was stated to be (R. 77) that if a user becomes dissatisfied for any reason with a manufacturer of chinaware, or if he

could get it made cheaper by another, he could get a pattern which would be compatible and fit in with the chinaware he had, so he would not be forced to discard it. Under the practice and custom, the customer and the public are, therefore, not hamstrung by the monopoly of a single source of supply which could force them to pay an exorbitant price or set impossible delivery dates or otherwise make free competition impossible.

It is said that the pattern named "Shadowleaf" was placed on china by Wallace and sold by it in 1948 (R. 34, 41) and it is admitted by Wallace that Tepco came into the market with the pattern of Plf. Ex. 2 in October 1949 (R. 26, 41), two years ago. No dates are given as to the other three patterns here involved and it is merely stated that such designs have been used in interstate commerce or commerce which may lawfully be regulated by Congress. Tepco, however, showed that it has used the name "Tweed" to designate the design complained about by Wallace, since April 1941 (Def. Ex. J. R. 78), long prior to any use by Wallace.

Upon these allegations and showings, the Court enjoined Tepco from making or selling any chinaware bearing patterns deceptively similar to the patterns of Plf. Ex. 3, 9, 11 and 13, and from using Plaintiff's "trade names or trademarks," "Magnolia," "Hisbiscus," "Tweed" and "Shadowleaf" (R. 91). Relief from the paralyzing effect of this injunction was secured by an order granting supersedeas (R. 93) and at the cost of substantial security in lieu of a bond (R. 94).

SPECIFICATION OF ERRORS

The errors relied upon and urged in this appeal are as follows:

1. The Court erred in finding and holding that Wallace is the owner of the trade names or trade-marks "Magnolia," "Hisbiscus," "Tweed" and "Shadowleaf" as applied to hotel china and is entitled to the exclusive use thereof against Tepco although there was no showing whatever that Wallace owned any of these marks, and in spite of the holding that none of them was registered under any Federal Act or under the laws of the State of California; in spite of the complete failure to show that the names were anything other than descriptive designations for designs; in spite of the fact that the names could not function either as trade-marks or trade names, and, further, in spite of the fact that there is no allegation that these names are trade-marks.

2. The Court erred in finding and holding that Wallace is the owner of the distinctive patterns identified by the trade names or trade-marks "Shadowleaf," "Tweed," "Hisbiscus" and "Magnolia," exemplified by Exhibits 3, 9, 11 and 13 appended to the motion for preliminary injunction and that it is entitled to the exclusive right to incorporate said patterns on hotel china even though none of these patterns has been copyrighted or protected by Design Letters Patent and the time for so doing has long since passed, and in spite of the fact that mere distinctiveness does not give it a monopoly in these designs; and in spite of the fact that each of these designs is in the public domain, that the copying of designs in the public domain is not a tort, and in spite of the fact that the custom in the business is for manufacturers to copy and simulate designs in the public domain for the benefit of the customers and the public.

3. The Court erred in finding and holding that the Court had jurisdiction under the Lanham Act 15 U.S.C.A. § 1051-1127, under the Paris Convention and the Inter-American Convention, in spite of the fact that no registered trade-mark is involved which would provide the basis for the statutory relief given in the Act, that there is a complete failure to state any cause of action for trade-mark infringement, and also in spite of the fact that the claim is merely one for a naked charge of unfair competition apart from any cause of action for patent, trade-mark, copyright, or trade name infringement and further, that there is a complete and abject failure to state a cause of action for unfair competition.

4. The Court erred in finding and holding that the Tepco by manufacturing, advertising and selling hotel china under the trade names or trade-marks "Magnolia," "Hibiscus," "Tweed" and "Shadowleaf" have infringed any right or competed unfairly with Plaintiff, as no valid right or claim has been established by Wallace.

5. The Court erred in finding and holding that Tepco by copying and imitating Plaintiff's patterns identified by the trade names or trade-marks "Magnolia," "Hibiscus," "Tweed" and "Shadowleaf" as exemplified by Exhibits 3, 9, 11 and 13, has competed unfairly with Wallace.

6. The Court erred in finding and holding that Wallace is entitled to a preliminary injunction against Tepco as prayed.

7. The Court erred in finding and holding that Tepco was guilty of unfair competition even though there was no passing off of Tepco products as and for Wallace's and even though the products of both Tepco and Wallace are

clearly marked, each with its own trade-mark, and even though it has long been the practice in the industry for manufacturers to copy or simulate designs used by other manufacturers unless the said designs were either protected by Design Letters Patent or copyrighted.

ARGUMENT OF THE CASE

The Granting of the Preliminary Injunction Against Tepco Was Improper and Should Be Dissolved

The granting of a preliminary injunction is usually withheld unless the Court, by examination of the pleadings and the affidavits, can determine that a *prima facie* case has been established, and the undisputed facts show that there is probable cause for an injunction on final hearing. The pleadings and the affidavits filed by the parties make it abundantly clear that the granting of the preliminary injunction against Tepco was an abuse of discretion and a grave injustice.

As already pointed out under the trade-mark cause of action, the Court found that no registered trade-mark is involved in this case (R. 84). Accordingly, Wallace has not established *prima facie* ownership in or right to the very words which are the subject matter of this cause of action. There is nothing in the pleadings or the affidavits from which the Court could conclude ownership of these words as the pleadings merely allege adoption and use (R. 5), which, of course, do not establish or show even *prima facie* ownership. On the contrary Tepco's affidavits have denied that these words are trade-marks or even trade names (par. 1, R. 68, 74).

It is clear from the complaint and the affidavits that the words "Magnolia," "Hibiscus," "Tweed" and "Shadowleaf" are not even alleged to be trade-marks, but are merely descriptive terms used by Wallace to identify designs. There is not only a complete failure to establish a *prima facie* ownership of these as trade-marks, but a complete failure to show that trade-marks are involved. No amendment is possible to cure these failures because the allegations show these names to be descriptive, generic words belonging to the public and having no trade-mark significance and are, therefore, not subject to injunction.

The unfair competition cause of action is founded upon the allegations which are repeated in the statements of the affidavits filed by Wallace, that Tepco has unlawfully used certain designs owned by Wallace exclusively and the Court has so held (R. 87). But the Court has also held that these same designs are not protected either by Design Letters Patent or by copyright (R. 85) and, therefore, Wallace has not established *prima facie* exclusive ownership in them. The Court has also held that the time for securing either copyright protection or Design Patent protection has long since passed (R. 85). This can only mean that the designs are now in the public domain for the free use of everyone, which means that it can now be determined with certainty that Plaintiff can never establish exclusive ownership in them. Tepco, therefore, should not have been enjoined from using designs and patterns which are freely available to everyone.

There can be no doubt that the judgment entered herein (R. 89) has the practical effect of a final decree for Wallace, as all of the issues have been decided with the result that

Tepco's business was stopped and its customers could not be supplied. Wallace, on the other hand, waited almost two years from the time Tepco first brought out its design (Plf. Ex. 2, R. 41, 46) to bring this suit and there is no more urgency now in the matter than there was nearly two years ago. With respect to the Tepco design known as "Tweed" (R. 57), Wallace waited nearly ten years after Tepco's use (Defs. Ex. J. R. 78). The urgency set up in the motion for preliminary injunction and referred to in the affidavits was the imminence of important exhibitions or restaurant shows which were to be held in the near future and particularly the show to be held in June of 1951 at the Shamrock Hotel in Houston (R. 23, 50, 54). This urgency was controverted and disappeared entirely when it was shown by the Tepco affidavits that it had no intention whatever of exhibiting in the Houston show (R. 73, 81).

It is well settled in this Circuit that the appellate court will reverse the order of the lower court granting a preliminary injunction when it appears that there was an abuse of discretion. See *Wilson v. The Best Foods*, 300 Fed. 484 (C.C.A. 9).

That there was an abuse of discretion in the granting of the preliminary injunction is manifest in that the District Court granted this extraordinary remedy when it was clearly erroneous both in law and in fact because:

(a) No *prima facie* ownership of any trade-mark, or even a trade-mark, had been established by Wallace.

(b) No jurisdiction of the trade-mark cause of action had been established under the Lanham Act because no registered trade-marks were involved and no amendment to the pleadings can show them as registered marks.

(c) The names alleged were obviously and admittedly descriptive, generic names identifying specific designs and of no trade-mark significance.

(d) No *prima facie* ownership of the designs forming the basis for the unfair competition cause of action was established in Wallace, nor could be established in Wallace, but on the contrary, the designs were shown to be in the public domain.

(e) Tepco has not been guilty of any misconduct in using designs in the public domain.

(f) There has been no passing off of Tepco products as and for that of Wallace either alleged or shown, nor can any be shown because each of the Tepco products is marked with its own trade-mark clearly identifying the source and origin.

(g) No urgency was shown requiring the immediate and drastic protection of Wallace's business or requiring a change in the *status quo*.

(h) The issuance of a preliminary injunction has the practical effect of a final decree for Wallace and should not have been entered at least until after a full hearing on the merits.

THE CAUSE OF ACTION FOR ALLEGED TRADE-MARK INFRINGEMENT

As already pointed out, the complaint states that it is for alleged trade-mark infringement and is founded upon the Lanham Act, 15 U.S.C.A. § 1051-1127. It is fundamental that the remedies provided in the Lanham Act for trade-mark infringement relate to the protection of *registered* trade-marks, i.e., trade-marks registered in the United States Patent Office.

Section 1114 of the Act provides in part:

“Any person who shall, in commerce, (a) use, without the consent of the *registrant*, any reproduction, counterfeit, copy, or colorable imitation of *any registered mark* in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services; * * * shall be liable to a civil *action by the registrant* for any and all of the remedies hereinafter provided in this chapter,” (emphasis added)

One of the remedies provided in the Act is the right of a registrant to injunctive relief and is set out in Section 1116.

The remedies given in the Lanham Act for trade-mark infringement are only for those who first comply with the requirements of registration of trade-marks. Since the Court has held (R. 84) that no Federally registered trade-mark is involved, or any registered trade-mark, it is apparent that Wallace has not complied with the requirements of the Lanham Act, and, therefore, the remedies provided for trade-mark infringement are not available. There can be no dispute that the Court had no jurisdiction of any alleged cause of action for trade-mark infringement under the Lanham Act and the same should have been dismissed. No amendment to the pleadings can cure the defect of lack of Federal registration of these names.

Not Only Is There a Total Lack of Jurisdiction for Any Alleged Cause of Action for Trade-Mark Infringement in This Case, but There Are No Allegations Which Could Form the Basis of a Cause of Action for Trade-Mark Infringement.

Neither the complaint nor the motion for preliminary injunction, nor the supporting affidavits, nor the order to show cause, refer to *any* trade-mark, whether a registered or a common law trade-mark. There is no allegation or claim that the names "Hibiscus," "Magnolia," "Tweed" and/or "Shadowleaf" were adopted and used as trade-marks. On the contrary, the allegations and assertion of facts show that the names were adopted and used merely as designations for and descriptive of designs used to decorate chinaware. For example, in the complaint (R. 7)

"that defendants have copied various of plaintiff's original patterns, including *the patterns known by the trade names 'Shadowleaf,' 'Tweed,' 'Hibiscus,' and 'Magnolia,'* have applied said copied patterns to china and have sold and are selling said china to the great damage and injury to plaintiff * * *."

In the complaint (R. 6):

"That Exhibit 1, attached hereto, is a pattern transfer originated by plaintiff and known by the trade name 'Shadowleaf,' said pattern being used by plaintiff on its china."

In the Motion for Preliminary Injunction (R. 21):

"1. Plaintiff is engaged in the manufacture and sale of hotel china *bearing the original patterns, such china being identified by plaintiff's trade names 'Shadowleaf,' 'Tweed,' 'Magnolia,' 'Hibiscus,' etc.'*"

* * * * *

"3. Plaintiff has extensively sold hotel china *bearing its original patterns, under its trade names,* throughout California and in many other states."

In the affidavit of Kenneth O. Wood, President of Wallace (R. 39):

“that the corporation has spent time, effort and money in popularizing said distinctive patterns under the trade names ‘Shadowleaf,’ ‘Tweed,’ ‘Hibiscus,’ ‘Magnolia,’ etc.; *that said trade names are used in identifying specific and distinctive patterns* originated by deponent’s corporation;” (emphasis added).

Plaintiff's Notations Not Capable of Exclusive Appropriation as Trade-Marks

Under the Judgment granting the preliminary injunction Tepco has been enjoined from using the words “Magnolia,” “Hibiscus,” “Tweed,” and “Shadowleaf,” which are held to be “trade-marks or trade names” owned by Wallace (R. 91) even though not pleaded as trade-marks or used as trade-marks. These allegations must have been intentionally omitted because Wallace could not state under oath that they were trade-marks.

Under the Lanham Act (15 U.S.C.A. § 1127) a trade-mark is defined as follows:

“The term ‘trade-mark’ includes any word, name, symbol or device or any combination thereof adopted and used by a manufacturer or merchant *to identify his goods and distinguish them from those manufactured or sold by others.*” (Emphasis added.)

The notations here sued upon and used by Wallace are not, in fact, names or words used by the manufacturer to identify his goods and distinguish them from the goods of others. They are merely designations of particular designs used to decorate standard hotel chinaware. The Court will observe that the only trade-mark used by Wallace to indi-

cate and identify chinaware manufactured by it consists of the words "Wallace China" and appears on the underside of the piece in the customary place (Plf. Ex. 1, Defs. Ex. G). It is used on every piece, regardless of the decoration used on the piece.

The word "Magnolia" is used by Wallace to designate a design pictorially showing magnolia blossoms and leaves in natural form (R. 60). The word "Hibiscus" is used by Wallace to identify a pattern pictorially showing hibiscus blossoms and leaves in natural form (R. 58). The term "Tweed" is used by Wallace to designate a design simulating the rough diagonal weave of the fabric known as "tweed" (R. 56). Wallace uses the notation "Shadowleaf" to designate a pattern which is a natural representation of tropical leaves with a shadowleaf background (R. 12). The designs are the likeness of the natural objects whose names they bear. Each one of these names is the word used by the public to describe and identify the same natural objects and reproductions of them. The names as applied to designs of this character are descriptive and the property of all of us. The use of these names to describe the natural objects and the representations of the natural objects belong to everyone and it is unthinkable that Wallace could be given the right of exclusive use of the word "Magnolia" for the purpose of identifying the artistic reproduction of a magnolia. And yet that is precisely what Wallace seeks in this lawsuit and what it received by the preliminary injunction.

These words are incapable of functioning as a trademark because they do not distinguish the goods from those of other manufacturers. Any manufacturer can make a de-

sign with a representation of a magnolia or hibiscus or any other object and call it by that name. The designs are each an embodiment of a natural object and the names denote the subject of designs and not the manufacturer or any manufacturer. Accordingly, they are incapable of functioning as a trade-mark.

In *Dollcraft v. Nancy Ann Story Book Dolls*, 94 F.S. 1; 88 U.S.P.Q. 18 (D.C.N.D. Calif.), the plaintiff claimed the exclusive right to the words "Red Riding Hood," "Little Bo Peep," "Little Miss Muffett," etc., for dolls portraying these fictional characters and had even secured registrations as trade-marks. The Court, in invalidating these trade-marks, held (p. 5):

"Each doll of such name is a manifestation of the fictional character itself, whose name served to identify and describe such doll. These names, as so applied, are descriptive; their use belongs to everyone and Nancy Ann cannot be given the right of their exclusive appropriation."

With respect to plaintiff's words "June Bride" and defendant's "June Girl" for bride dolls, the Court held (p. 5):

"The name denotes the doll, not the manufacturer; it is a descriptive name, invalid as a trade mark."

The situation here is precisely that in the case of *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, where the plaintiff claimed the exclusive right to the trade name "Shredded Wheat." Mr. Justice Brandeis in holding that the name was generic and not susceptible of any exclusive appropriation, said (p. 116):

"The plaintiff has no exclusive right to the use of the term "Shredded Wheat" as a trade name. For that is

the generic term of the article, which describes it with a fair degree of accuracy; and is the term by which the biscuit in pillow-shaped form is generally known by the public. Since the term is generic, the original maker of the product acquired no exclusive right to use it."

No trade-mark significance can attach to words which are so thoroughly descriptive and have no other significance. *Ex parte American Map Co.*, 85 U.S.P.Q. 51, 52 (Com. of Pat.). The primary purpose of a trade-mark is to distinguish the goods of one manufacturer from those of another and unless a trade-mark performs this function, the first user of it cannot be injured by the use of it by others, nor can the public be deceived.

In *Canal Co. v. Clark*, 80 U.S. 311, plaintiff sought the exclusive trade-mark right in the phrase "Lackawanna Coal" and probably was the first to use it. The Court held this phrase could not function as a trade-mark and stated (p. 323):

"Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark and the exclusive use of it be entitled to legal protection."

and again at p. 327:

"True it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product, but if it is just as true in its application to his goods as it is to those of another who first applied it, and who therefore claims

an exclusive right to use it, there is no legal or moral wrong done. *Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth.*"

The District Court was clearly in error in granting the preliminary injunction enjoining Tepco from using the words "Magnolia," "Hibiscus," "Tweed" and "Shadowleaf," as being trade-marks exclusively owned by Wallace. No amendment can cure this fundamental defect in Wallace's case.

Plaintiff's Notations Are Not Even "Trade Names"

The tenuousness and insincerity of Wallace's claims are exposed in that the notations "Magnolia," "Hibiscus," "Tweed," and "Shadowleaf" have been held by the District Court to be "trade-marks *or* trade names," in the alternative (R. 86). Obviously, they cannot be both trade-marks and trade names as they represent separate and distinct legal concepts. Here they are *neither* trade-marks or trade names under the Lanham Act.

In re Lyndale Farm, 186 F.(2) 723; 88 U.S.P.Q. 377, held (p. 726-727):

"Trade marks and trade names are distinct legal concepts within the ambit of the law of unfair competition. A trade mark is fanciful and distinctive, arbitrary and unique. A trade name may be descriptive, generic, geographic, common in trade sense, personal, firm, or corporate. A trade mark's function is to identify and distinguish a product whereas a trade name's function is to identify and distinguish a business. Prior to the Lanham Act the general requirement was

that a trade mark be affixed to the goods it was to identify and distinguish, while it was unnecessary to attach a trade name to merchandise. Trade marks have traditionally been protected by actions for trade mark infringement; trade names, by actions to restrain passing-off or unfair competition. The distinction between trade marks and trade names has been so well and so long established that we would not attribute to Congress the intention to dissolve the distinction merely on the strength of the possible inference contained in the fourth proviso of Section 15 of the Act. An inference is not a sufficient basis for any conclusion that Congress intended to merge well established and distinct common law concepts."

Since the Wallace names are admittedly not trade-marks (R. 39, 21) and cannot function as trade-marks, it is necessary to determine whether or not they are trade names. This is further required because the allegations of the complaint are directed only to Defendants' unauthorized use of *trade names* (R. 6, 7, 8 and 9).

It is clear from the provisions of the Lanham Act that the distinctions between trade-marks and trade names were to be maintained, for the definition of trade names is as follows (15 U.S.C.A. § 1127):

"The terms 'trade name' and 'commercial name' include individual names and surnames, firm names and trade names used by manufacturers, industrialists, merchants, agriculturists and others *to identify their business, vocations, or occupations*; the names or titles lawfully adopted and used by persons, firms, associations, corporations, companies, unions, and many manufacturing, industrial, commercial, agricultural, or other organizations engaged in trade or commerce

and capable of suing and being sued in a court of law.”
(Emphasis added.)

Since the Wallace notations “Magnolia,” “Hibiscus,” “Tweed” and “Shadowleaf” merely describe and designate designs which decorate china (R. 5, 6, 7, 8 and 9) and are admitted to be such only (R. 21, 22, 24), they do not come within the definition of the Lanham Act as a “trade name” or “commercial name.” If any further clarification is needed it is quite obvious that these notations do not identify the Wallace “business,” “vocation,” or “occupation,” as required by the Lanham Act. In addition, there is no allegation that such notations perform these functions. Wallace’s reference to its words as “trade names” rather than “trade-marks” is a thinly veiled attempt to secure an advantage by confusion from the similarity of terms. Wallace knows they are not trade-marks and tested by the Lanham Act definition they are not even trade names. The finding that they are “trade-marks *or* trade names” when they are neither, is clearly error, and the preliminary injunction based upon this finding is improperly issued.

Wallace has completely failed to sustain the burden (1) of presenting any trade-mark which is entitled to the remedies provided for by the Lanham Act, and (2) to set forth a cause of action for trade-mark infringement. Obviously, where the remedies of the Lanham Act are not available to Wallace because of the failure to secure a registered trade-mark, the same remedies will not be given to Wallace or made available to Wallace on unregistered marks by merely referring to them as trade names and thus circumvent the purpose of the Act, which is the protection of registered

marks. It is apparent that if the same remedies could be obtained without registration, there would be no incentive or reason to go through the costly, time consuming, and sometimes disappointing experience of securing registration in the United States Patent Office. This Court will not permit Wallace to accomplish by indirection that which it could not accomplish directly.

**The Judgment Relating to Trade-Mark Infringement
Should Be Reversed and the Cause Dismissed**

Merely calling the Wallace notations either trade-marks or trade names will not make them so in fact. Accordingly, under the showing here made by Wallace, the alleged trade-mark cause of action is obviously devoid of equity upon its face and the deficiencies are of such character as to be incapable of remedy by amendment to the pleadings or the offer of proof. Accordingly, it is proper and equitable for this Court upon this appeal from an order granting the temporary injunction, to dismiss the trade-mark cause of action before the answer is filed or proofs taken. This was the holding of *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485. The Court speaking through Mr. Justice Brown stated the question as follows (p. 494):

“One of the principal questions pressed upon our attention related to the power of the Court of Appeals to order the dismissal of the bill before answer filed, or proofs taken, upon appeal from an order granting a temporary injunction.”

In affirming the Circuit Court of Appeals action, the Court stated (p. 495):

“Does this doctrine apply to a case where a temporary injunction is granted *pendente lite* upon affidavits and

immediately upon the filing of a bill? * * * if the bill be obviously devoid of equity upon its face and such invalidity be incapable of remedy by amendment * * * we know of no reason why, to save a protracted litigation, the court may not order the bill to be dismissed."

Accordingly, the judgment granting the preliminary injunction should be reversed and the cause of action relating to trade-mark infringement should be dismissed.

THE CAUSE OF ACTION ASSERTED BY WALLACE FOR ALLEGED UNFAIR COMPETITION

In order for Wallace to be entitled to a preliminary injunction on the unfair competition cause of action, it must sustain its burden of showing, *first*, that the Court had jurisdiction of this cause of action under the Lanham Act, and, *second*, if the Court has jurisdiction, that a cause of action has been stated upon which the relief sought can be given. The failure of either of these points is fatal, requiring the judgment granting the preliminary injunction to be reversed and the action dismissed. Either failure is incapable of remedy by amendment of the pleadings.

The District Court Had No Jurisdiction of the Alleged Cause of Action for Unfair Competition as Set Forth in the Complaint

It has been alleged, and the District Court has held, that it has jurisdiction of the unfair competition cause of action under the Lanham Act even though there is no diversity of citizenship, and even though it is not joined with a substantial and related claim under the copyright, patent or trade-mark laws. At the outset, one must face the unmis-

takable fact that the Lanham Act does not state anywhere in its text, that the Federal Courts shall have original jurisdiction of causes of action for unfair competition in the absence of diversity of citizenship or apart from infringement of a copyright, patent or trade-mark.

Wallace's attempt to secure Federal jurisdiction is based upon *its* interpretation of the opinion by this Court in the case of *Stauffer v. Exley*, 184 F.(2) 962; 87 U.S.P.Q. 7 (C.A. 9). Wallace relies upon this case as the authority for establishing that under the Lanham Act, Districts Courts shall have original jurisdiction of a naked claim for unfair competition. This, however, is not the holding of this Court.

In the *Stauffer* case, this Court concluded, as did the District Court, that the plaintiff had a valid trade name, "Stauffer System," to which it had the *exclusive* right, and that the defendant was using this trade name to mislead the public. Thus, there is very definitely a holding that the cause of action for unfair competition was coupled with an unlawful use of a trade name which was the exclusive property of the plaintiff, in this field. Thus, plaintiff clearly established that it had the exclusive property right in the trade name "Stauffer System" which was being injured directly by the conduct of the defendant.

This Court added an important limitation to its holding in the *Stauffer* case. Under the prior act, it was required to establish infringement in interstate or foreign commerce. Under the Lanham Act, however, it was only necessary to show that the infringer has used the trade-mark in commerce which Congress has the power to regulate. Also, it is clear that the Court relied heavily upon the fact that "Stauffer System" was a valid trade name under the Lan-

ham Act to which the plaintiff had the exclusive right for this field. The first limitation of the *Stauffer* case is that in the absence of a claim under the patent, copyright or trademark laws, the plaintiff must allege and prove some property to which it has the *exclusive* right.

When the *Wallace* case is tested by this limitation of the *Stauffer* case, it is apparent that the jurisdiction of the District Court cannot be sustained. There is no claim for patent, trade-mark, or copyright infringement involved and in view of the pleadings and holdings none can be alleged. Wallace has not alleged or even claimed, and cannot allege or claim a trade-mark or a trade name to which it has the *exclusive* right, or any other property to which it can claim the *exclusive* right. Thus, the present case fails to comply with this limitation of the *Stauffer* case, and, failing in this, there is no jurisdiction of the alleged cause of action for unfair competition.

The Allegations of the Complaint Do Not Set Forth a Cause of Action for Unfair Competition

In any event Wallace has still failed to state a claim in unfair competition upon which relief, and particularly the preliminary injunction, can be granted.

At the outset it must be clearly understood that all competition, fair or unfair, has only one purpose and is designed to destroy the competitor's business or take away as much of it as possible, with consequent loss of profits and injury to his feelings and pocketbook. Free competition is the very spirit and meaning of business in the United States. The doctrine of unfair competition cannot be evoked to abridge freedom of competition. Thus, the wailings of Wallace that it is being hurt by Tepco's competition, that

it is losing business, that it believes its good will is being destroyed through the loss of business, and all the other pitiful clamor which it has set up, does not mean that there is *unfair* competition.

Of the acts of unfair competition alleged in the complaint herein, the only one found is in Conclusion of Law No. V (R. 87) which is that Tepco by copying and imitating Wallace patterns identified as "Magnolia," "Hibiscus," "Tweed" and "Shadowleaf" have competed unfairly with Wallace.

In order to sustain a claim for unfair competition, Wallace must have the exclusive right to the artistic property of these four designs in question. The findings disclose that there was no holding that Wallace owned the exclusive right to these designs but only that it was "entitled to the exclusive right to incorporate said patterns in hotel china as against" Tepco (R. 86). If this means that Wallace has the exclusive right to these designs then this is contrary to the law and the fact.

This Court has recently held in *Chamberlain v. Columbia Pictures Corporation*, 186 F.(2) 922; 89 U.S.P.Q. 7 (C.A. 9) that in order for a plaintiff to recover and secure the relief sought, it is necessary to allege that it has the exclusive right to the subject matter of the suit. In holding that the plaintiff did not have a monopoly and that it owned only a portion of the extant works of Mark Twain and, therefore, could not sustain a cause of action for unfair competition, the Court, speaking through Circuit Judge Orr, stated (p. 925):

"In order to entitle appellants to the relief sought *it would be necessary for them to allege that they have an exclusive right to the use of the story in question and they must be injured directly by appellee's acts.*"

Not only does Wallace not have the limited monopoly and exclusive rights afforded by Design Letters Patent covering these four patterns, but the holding that the time has passed in which such monopolies could have been obtained (R. 85), means that *it cannot by amendment or otherwise claim the exclusive right in these four designs.*

**Wallace Does Not Have and Cannot Assert Exclusive Ownership
of the Designs Used to Decorate China**

There are four designs used by Wallace mentioned in the complaint which it claims to own exclusively. One described as "Magnolia" is the pictorial representation of magnolia blossoms and leaves (R. 60). Another known and described as "Hibiscus" is a pictorial representation of hibiscus blossoms and leaves (R. 58). The third, known as "Tweed," is a diagonal uneven line made to simulate the rough weave of the fabric known as "tweed" (R. 56), and the fourth, known and described as "Shadowleaf" is the pictorial representation of tropical leaves with shadowleaves in the background (R. 12). Wallace alleges with respect to these designs (R. 5)

"Plaintiff corporation has employed artists to create and design new, unique, and original patterns and developed distinctive patterns."

The four patterns identified are the distinctive patterns which are the subject matter of this suit.

It is clear from the allegations that Wallace is claiming the exclusive right to these designs as the inventor of new, unique and original patterns. The inventor or originator of new and original designs can claim ownership in only two distinct and separate ways, one at common law, and the

other under the Design Patent Statute. *Ellis Patent Assignments and Licenses*, 2nd Ed. (1943) p. 1.

The distinction between these two rights is carefully set forth by Mr. Justice Harlan in *Patterson v. Commonwealth*, 97 U.S. 501; 24 L.Ed. 1115 (p. 507):

“Although the inventor had at all times the right to enjoy the fruits of his own ingenuity, in every lawful form of which its use was susceptible, yet, before the enactment of the statute, he had not the power of preventing others from participating in that enjoyment to the same extent with himself; so that, however the world might derive benefit from his labors, no profit ensued to himself. The ingenious man was therefore led either to abandon pursuits of this nature or conceal his results from the world. The end of the statute was to encourage useful inventions, and to hold forth, as inducements to the inventor, the exclusive use of his inventions for a limited period. The sole operation of the statute is to enable him to prevent others from using the products of his labors except with his consent.”

Wallace had the same options. It could (a) claim ownership of these designs at common law, in which event it could either keep them secret or make, use and sell them without the power of preventing others from doing the same thing or deriving any profit therefrom, or (b) it could have availed itself of the protection of the patent statute and secured Design Letters Patent, which would have provided it with the right to exclude others, including Tepco, from making, using or selling these designs. The Court has held that none of these four designs or patterns was protected by Design Letters Patent or the statutory protection pro-

vided by the copyright laws and that the time for so doing had long since passed (R. 85). Under the law this can only mean that Wallace is relying upon, and can only rely upon, its common law rights which do not carry with it the legal right to prevent others from making, using or selling the designs of these inventions.

It is apparent that these designs were not kept secret for Wallace has used these designs to decorate chinaware shipped both in interstate and intrastate commerce (R. 5). It must necessarily follow, therefore, that these designs are in the public domain through the voluntary conduct of Wallace and, being in the public domain, these designs are available for the free use of any member of the public, including Tepco, without any remuneration to Wallace.

Tepco Justified in Using Designs in the Public Domain

The law is perfectly clear that there can be no tort or wrong committed by Tepco, or any other member of the public, in using a design which is in the public domain.

In *Marcus Window Display v. New England Decorators'*, 88 U.S.P.Q. 310 (D. C. Mass. - 1951), the action was for copyright infringement and unfair competition. The opinion is directed to plaintiff's Motion to Dismiss defendant's counterclaim and strike a paragraph of the Answer. District Judge Ford, in granting these motions and dismissing the counterclaim, held (p. 311):

"Passing the question whether the counterclaim on page 8 of defendant's answer is a compulsory counterclaim or a permissive one requiring independent grounds of jurisdiction that are not present in the present case, *yet the contention of plaintiff is correct that it does not state a claim upon which relief can be*

granted. The claim alleges merely that plaintiff 'has copied designs original with the defendant.' The designs copied are not covered by design patents nor copyrighted and there is nothing unlawful in copying the designs. See cases collected in Unique Art Manufacturing Co., Inc. v. T. Cohn, Inc., 178 F.2d 403 (83 U.S.P.Q. 533)." (Emphasis added.)

In *Cheney Brothers v. Doris Silk Corp.*, 35 F.2d 279; 3 U.S.P.Q. 162 (C.C.A. 2 - 1929) cert. den. 281 U.S. 728 the case was brought on appeal from an order of the District Court denying an injunction *pendente lite* to enjoin the Defendant's unfair competition. The plaintiff was a manufacturer of silks which puts out many new patterns each season designed to attract purchasers by their novelty and beauty. In practice it was impractical to cover each of these patterns with a design patent. The Court also noted that it was impossible under the copyright law to protect them with a copyright (17 U.S.C. Section 1 *et seq.*). *Thus, the plaintiff was without any statutory protection.* Taking advantage of this situation, the defendant copied one of the popular designs and undercut the plaintiff's price therefor and it was this conduct which brought about the suit for unfair competition. The Court charged the defendant with knowledge of the fact that it was copying Plaintiff's designs. In the opinion by Circuit Judge Learned Hand, it was held (p. 280):

"The upshot must be that, whenever anyone has contrived any of these, others may be forbidden to copy it. That is not the law. *In the absence of some recognized right at common law, or under the statutes—and the plaintiff claims neither—a man's property is limited to the chattels which embody his invention. Others may*

imitate these at their pleasure. Flagg Mfg. Co. v. Holway, 178 Mass. 83, 59 N.E. 667; Keystone Co. v. Portland Publishing Co., 186 F. 690 (C.C.A. 1); Heide v. Wallace, 135 F. 346 (C.C.A. 3); Upjohn Co. v. Merrell Co., 269 F. 209 (C.C.A. 6); Hudson Co. v. Apco Co. (D. C.) 288 F. 871; Crescent Tool Co. v. Kilborn & Bishop Co., 247 F. 299 (C. C. A. 2); Hamilton Co. v. Tubbs Co. (D. C.), 216 F. 401; Montegut v. Hickson, 178 App. Div. 94, 164 N.Y.S. 858."

In *Verney Corp. v. Rose Fabric Corp.*, 87 F.S. 802; 83 U.S.P.Q. 386 (DC SD New York - 1949) suit was brought for copyright infringement and for unfair competition. The case arose on two motions, one a motion by plaintiff for a preliminary injunction and the other a motion by defendant to dismiss for failure to state a claim upon which relief may be granted. With respect to the plaintiff's design, which was the subject matter of the suit, the Court, District Judge Coxe, stated (p. 803):

"Plaintiff's design is not an artistic reproduction of a single chrysanthemum, *but an artistic reproduction of several curly chrysanthemums, each surrounded by similar curly lines, so that they all blend into a harmonious whole.* It appears from the affidavits submitted, and from an inspection of the dresses exhibited on the argument that *the design is printed in a continuous running form, repeating the design over and over*, in distinctive colors, upon the fabric from which the dresses are made, and also that the fabric itself is in distinctive colors. There is no showing by plaintiff that there was any copyright notice upon each repetition of the design. Defendants contend not only that the copyright is invalid but also that, if it is valid, copyright protection has been lost through publication without a proper copyright notice."

On the copyright cause of action, the Court held (p. 804):

“While the design may have been properly registered as a print for an article of merchandise, plaintiff, by printing it on the fabric from which the dresses are manufactured, uses the design as a part of the article of merchandise itself. It is obviously not used in connection with a sale or an advertisement of either the fabric or the dresses, *but is an attempt by plaintiff to obtain a monopoly of the design in the manufacture of dress fabrics and dresses, to which it is not entitled.* * * * plaintiff’s copyright on the design has been lost by failure to publish on the fabric and the dresses, in connection with the design, the proper copyright notice. ‘Every reproduction of a copyrighted work must bear the statutory notice.’ (DeJonge & Co. v. Breuker & Kessler Co., 235 U.S. 33, 36.)” (Emphasis added.)

On the unfair competition cause of action, the Court held (p. 804):

“As to the second count for unfair competition, the case is indistinguishable from *Cheney Bros. v. Doris Silk Corp.*, 2 Cir., 35 F.2d 279 (3 U.S.P.Q. 162), Cert. denied 281 U.S. 728, *where it was held that anyone might copy plaintiff’s silk patterns which had not been protected by a design patent or by a copyright.* See also *Lewis v. Vendome Bags, Inc.*, 2 Cir., 108 F.2d 16 (43 U.S.P.Q. 477), Cert. denied 309 U.S. 660 (44 U.S.P.Q. 719), and *Electric Auto-Lite Co. v. P. & D. Mfg. Co.*, 2 Cir., 109 F.2d 566 (44 U.S.P.Q. 377). The New York law is also in accord with these decisions. (*Maveco, Inc. v. Hampdon Sales Ass’n.*, 273 App. Div. 297 (77 U.S.P.Q. 62; *Margolis v. National Bellas Hess Co.*, 139 Misc. 738.)”

Wallace Seeks a Monopoly in Perpetuity of Designs Now Belonging to Everyone and a Monopoly Far Greater Than the Constitution Authorized Congress to Grant.

The patent laws, which include those relating to designs, were passed by Congress pursuant to Article I, Section 9 of the Constitution which authorized Congress to secure "for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The Copyright Act (17 U.S.C.A.) was passed by Congress for the protection of authors and the patent statute (35 U.S.C.A.) was passed for the protection of inventors. Each provided for limited monopolies. Design Patents may be secured for periods of three and one-half years, seven years and fourteen years and may not be renewed. At the expiration of the patent, the design belongs to the public, free and clear. Under the Copyright Act, the monopoly is for a period of twenty-seven years and may be renewed for one additional period under certain conditions extending the time to a total of sixty-four years. By its complaint for unfair competition, Wallace is requesting a court of equity to grant it a perpetual monopoly with respect to designs which are in the public domain. It is requesting, and so far has received, rights which are more extensive and more far reaching than Congress is permitted to grant under the Constitution. It is asking the Court to grant these rights without the official examination made by the Patent Office as to the novelty or invention of these designs at a time after it would be possible to secure such protection in legitimate channels through the procedure of the Patent Office. the inequity and effrontery of such requests have been recognized by the Courts and summarily refused.

In *Cheney Brothers v. Doris Silk Corporation*, 35 F.(2) 279; 3 U.S.P.Q. 162 (C.C.A. 2), cert. den. 281 U.S. 728, Circuit Judge Learned Hand, stated with respect to the facts previously discussed herein (*Supra*, p. 30), as follows (p. 280) :

“Qua patent, we should at least have to decide, as *tabula rasa*, whether the design or machine was new and required invention; further, we must ignore the Patent Office, whose action has always been a condition upon the creation of this kind of property. Qua copyright, although it would be simpler to decide upon the merits, we should equally be obliged to dispense with the conditions imposed upon the creation of the right. Nor, if we went so far, should we know whether the property so recognized should be limited to the periods prescribed in the statutes, or should extend as long as the author’s grievance. It appears to us incredible that the Supreme Court should have had in mind any such consequence. To exclude others from the enjoyment of a chattel is one thing; *to prevent any imitation of it, to set up a monopoly in the plan of its structure, gives the author a power over his fellows vastly greater, a power which the Constitution allows only Congress to create.*”

There is no justification or excuse for Wallace to seek an unlimited monopoly in perpetuity, covering designs which are now in the public domain and thus eliminate the free competition which has existed. The mere solicitation of a Court of Equity to perpetrate this restraint of trade shocks the conscience. Since the District Court did not, this Court must protect the public from such an abuse.

Tepco Did Not Pass Off Its Products as and for Wallace's

There remains the question as to whether Tepco competed fairly with Wallace in exercising its rights to use the generic names and in using designs which are in the public domain. The law does not require that there be no possibility of error or confusion. *Canal Co. v. Clark*, 80 U.S. 311, 327 (supra, p. 18). Tepco, as a member of the public, is free to use the generic names and designs but the law imposes a duty on it to identify its products lest they be mistaken for those of Wallace, or any other manufacturer.

In *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, at p. 120, Mr. Justice Brandeis stated:

“The question remains whether Kellogg Company in exercising its right to use the name ‘Shredded Wheat’ and the pillow-shaped biscuit, is doing so fairly. *Fairness requires that it be done in a manner which reasonably distinguishes its product from that of plaintiff.*”

In *Swanson Mfg. Co. v. Feinberg Mfg. Co.*, 54 F.S. 805; 59 U.S.P.Q. 10 (D.C. S.D. N.Y.), Judge Leibell held (p. 15):

“Since the coin rack may be manufactured by all (its patent is invalid) plaintiff could not assert exclusive rights *in the form ‘in which the public had become accustomed to see the article.’* Defendants in turn were free to use that form of coin rack and purse but there rested upon them the duty to identify their product lest it be mistaken for plaintiffs’ and to use means which would reasonably distinguish defendant’s product from that of plaintiff.” (Emphasis added.)

There is no dispute that Tepco has marked all of its products, including those complained of here, with its own

trade-mark "TEPCO" (R. 73, 79), and that this trade-mark is placed on the bottom of the ware (Plf. Ex. 2, Defs. Ex. D, E, F, H) under the glaze and in the place where the public has been accustomed to look for the manufacturer's mark as indicating the source of origin of the chinaware. Likewise the cartons in which the goods are shipped are plainly marked "From TEPCO CHINA Co. El Cerrito, California" (R. 17). No one who can read can be misled in any way.

There is no showing and there are no allegations by Wallace that Tepco has offered any of its products for sale or has sold any of its products as and for those of Wallace. On the contrary, the affidavits of dealers, offered by Wallace (R. 24, 35), establish beyond any doubt that the sale to them of Tepco's chinaware, with the designs here complained of, were made by Antone Pagliero "representing Technical Porcelain and Chinaware Co. of El Cerrito, California," also known as Tepco (R. 26, 36).

Tepco has taken every reasonable and customary step to see that its products are properly marked with the source of origin and when sales were made; it has taken the precaution in making sales to see that there were no misrepresentations and that the dealers were fully advised Mr. Antone Pagliero was representing and acting on behalf of Tepco and so understood it.

In a recent case, this Court has held that where there was in fact no misrepresentation and no passing off, a cause of action for unfair competition was not stated. In the case of *Chamberlain v. Columbia Pictures Corp.*, 186 F.(2) 922; 89 U.S.P.Q. 7 (C.A. 9), action was brought for trade-mark infringement and for unfair competition. The

trial court dismissed the complaint on motion and in affirming the dismissal, Circuit Judge Orr held (p. 925):

"We are not concerned with proof. At first blush it might be said that the allegations made fit snugly into the provisions of § 1125, T. 15 U.S.C.A. However, we do not think said section changes the fundamental requirements necessary to sustain a suit for unfair competition, one such requirement being a direct injury to the property rights of a complainant by passing off the particular goods or services misrepresented as those of complainant. Deceiving the public by fraudulent means, while an important factor in such a suit, does not give the right of action unless it results in the sale of the goods as those of the complainant." (Emphasis added.)

Both Antone and Arthur Pagliero stated under oath that Tepco products, no matter what color, design or designation, have never been, and would not be permitted to be, passed off as and for the product of any other manufacturer including Wallace (R. 73, 79).

The defect of Wallace's failure to allege the passing off of Tepco's products as and for Wallace's, cannot be cured by amendments to the pleadings. The affidavit of Antone Pagliero, who handles all of the sale for Tepco (R. 74), establishes the unassailable fact that Tepco sells only to dealers (R. 75). The purchasers of Tepco's products are men skilled in the handling of chinaware and know that each piece is properly marked with the source of origin in Tepco, and could not be fooled or misled in any way. Likewise, the public has been schooled for years in identifying the origin of chinaware by referring to the manufacturer's mark on the bottom thereof, so that Tepco has at all times

provided the usual and customary means for correctly identifying the source of origin of each piece as being the manufacture of Tepco and not Wallace. No one, therefore, could be deceived under any circumstances.

In addition, Tepco is no "fly-by-night" organization. The father of Arthur and Antone Pagliero founded the first vitrified china plant on the Pacific Coast in 1910 (R. 68). The present business was founded in 1920 (R. 75). It owns one of the most modern and up-to-date plants for the manufacture of vitrified hotel china in the United States (R. 75). Both of these brothers, as their father before them, have literally spent their entire lives in this industry (R. 68, 75). This is a family business of long standing and they are justifiably proud of their own Tepco products and reputation (R. 79, 73). They do not want to and do not need to trade on any one's reputation, as their own is quite the equal of any other manufacturer, including Wallace.

Under the Authority of the Mast, Foos Case, the Preliminary Injunction Should Be Dissolved and the Cause of Action for Unfair Competition Dismissed.

The situation with respect to the Wallace claim for alleged Federal unfair competition is precisely the same as that of its charge for Federal trade-mark infringement previously discussed. (Supra, p. 22).

The complaint shows on its face that it is completely devoid of equity. It has been shown from the allegations that the Court does not have jurisdiction of the cause of action for unfair competition. It has likewise been shown that if this Court should conclude there was jurisdiction, then a Federal cause of action for unfair competition has not been stated, *first*, because Wallace does not own the ex-

clusive right to the designs which are the subject matter of this cause of action; *second*, because in using the alleged designs, Tepco has taken every reasonable precaution to identify each of its products with its own trade-mark for permanent and ready identification of the true source of origin; and, *third*, because there is no allegation that Tepco has in any way passed off its products as and for those of Wallace.

In addition, it has also been shown that the jurisdictional failure cannot be cured by amendment. Also, the failure to state a cause of action cannot be cured by amendment, not only because of the admittedly fair nature of the sales, but also because of the permanent, ready identification of each piece as to its proper origin in Tepco.

In the case of *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 494, under similar circumstances where the trial court had granted a temporary injunction and the Circuit Court of Appeals had not only dissolved the injunction and dismissed the bill before any proofs were taken, the Supreme Court in affirming the action of the Circuit Court of Appeals dismissing the bill stated (p. 495):

“* * * if the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment; or if the patent manifestly fail to disclose a patentable novelty in the invention, we know of no reason why, to save a protracted litigation, the court may not order the bill to be dismissed. * * *

“There was no error in the action of the Circuit Court of Appeals, and its decree is affirmed.”

CONCLUSION

Stripping the Wallace case of the emotion and pathos injected to engender sympathy and obscure truth, the skeleton is revealed, a portent of the future if this appeal fails. The skeleton exposes that Wallace has not stated a cause of action for Federal trade-mark infringement, nor has it stated a Federal cause of action for unfair competition—and it knows that it has not. This suit, therefore, is a calculated step to take from the public, names and artistic property which are for the enjoyment and use of all of us and, with the aid of the Court, establish a perpetual personal monopoly vastly greater than the Constitution permits, in defiance of the patent laws. The granting of the preliminary injunction establishing this monopoly and restraint of trade in Wallace, is the clearest kind of abuse of discretion and should be summarily reversed.

Under these circumstances, it is completely evident that no amount of amendment to the pleadings can establish equity in Wallace, and Tepco should be spared the necessity and expense of unreasonable litigation. It is respectfully submitted that this Court should reverse the judgment of the District Court with instructions to dismiss the complaint.

Dated: San Francisco, California, December 27, 1951.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANTONE PAGLIERO and ARTHUR PAGLIERO, general partners, doing business as TECHNICAL PORCELAIN & CHINAWARE Co.,

Appellants,

vs.

WALLACE CHINA Co., LTD., a corporation,

Appellee.

BRIEF FOR APPELLEE.

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WALLACE CHINA Co., LTD., a corporation,

Appellee.

BRIEF FOR APPELLEE.

INTRODUCTION.

Appellants, the Paglieros (defendants below*) partners doing business as Technical Porcelain & Chinaware Co., have appealed from an interlocutory judgment granting a preliminary injunction restraining the appellants from making and selling china bearing patterns exemplified by

*The parties shall be referred to as plaintiff and defendants. The references to the record shall be by R. followed by page number. Emphasized matter in decisions is by plaintiff-appellee.

Exhibits 3, 9, 11 and 13 and from using plaintiff's trade names or trade marks, "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" in the identification of such hotel chinaware [R. 91]. The interlocutory judgment and preliminary injunction were granted upon a motion for preliminary injunction and order to show cause, after a hearing during which appellants introduced testimony.

It is submitted that on the facts before the Trial Court the interlocutory judgment was proper, the findings of fact and conclusions of law [R. 83-88] were amply supported by the record, and this Court should affirm the Trial Court.

JURISDICTION.

Plaintiff (Wallace China Co., Ltd.) and defendants are both citizens and residents of California; there is no diversity of citizenship. The Federal Courts have jurisdiction because this is an action for infringement of trade marks and unfair competition and the amount in controversy exceeds \$3,000 [R. 4]. The Federal Courts have jurisdiction under the provisions of the Lanham Act of July 5, 1946, 15 U. S. C. A., Sections 1051-1127, and 28 U. S. C. A., Sections 1337 and 1338. It is submitted that the question of jurisdiction has been conclusively determined by this Court's ruling in *Stauffer v. Exley*, 184 F. 2d 962 (C. A. 9).

BRIEF STATEMENT OF THE CASE.

Plaintiff is a California corporation with a plant near Los Angeles, California. Plaintiff has been engaged for many years in the manufacture and sale of vitrified hotel china which is sold through many dealers throughout California and throughout the western part of the United States and the Territory of Hawaii [R. 4; Wood Affidavit, R. 38]. Approximately 40% of its hotel china is shipped to dealers outside the State of California and is therefore in interstate commerce.

Hotel china is sold by its attractive appearance. Plaintiff has employed artists who have conceived and drawn new, original and distinctive designs or patterns which are then applied to the hotel chinaware made by plaintiff. Plaintiff was the first to appropriate certain trade marks or trade names for the identification of its china, the names in question being "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia." These trade names are used in identifying specific and distinctive patterns originated by plaintiff.

By reason of the attractiveness of these four patterns, the quality of the china, and the advertising and distribution by plaintiff, these four patterns and trade names became very popular and valuable. Good will and reputation were built up in the patterns and trade names. The record before the Trial Court showed that the trade associated these patterns and trade names with plaintiff. They recognized the patterns as indicating origin of the hotel china with plaintiff [R. 6; Affidavits of Elster, R. 26, 27; Robertson, R. 35-36; Delany, R. 47].

Defendant partnership, also engaged in the manufacture and sale of hotel china, copied plaintiffs' distinctive

patterns and sold them under the same trade names or trade marks as had been previously appropriated by plaintiff. Defendant partnership sold the copies within the State of California and in interstate commerce. Purchasers were confused by such copies. Former purchasers of plaintiff purchased defendants' copies, believing them to originate with plaintiff and then complained to plaintiff when the copies developed faults.

Upon considering the verified complaint and numerous affidavits, after inspecting the physical exhibits, and listening to argument by counsel, and after considering the applicable rules of law, the Trial Judge (Honorable Edward P. Murphy) granted the Motion for Preliminary Injunction and made appropriate Findings of Fact and Conclusions of Law [R. 83-88].

Unless defendants can show that the findings are in substantial error, the judgment must be affirmed. Actually, defendants do not contend that the findings are in error and their argument is only directed to the conclusion reached; the facts compel affirmation of the interlocutory judgment.

"Nowhere in appellant's brief is there a contention that the district court's findings are erroneous; instead, the argument is directed to the trial court's failure to find that the enumerated concepts constituted invention."

R. G. LeTourneau, Inc. v. Gar Wood Industries, Inc., 151 F. 2d 432, 434 (C. A. 9).

BRIEF SUMMARY OF PLAINTIFF'S ARGUMENT.

It is submitted that the Trial Court properly granted the interlocutory judgment and preliminary injunction.

- (1) Trade marks and trade names constitute property rights which the courts protect.
- (2) The dress or appearance of an article, which purchasers recognize and associate with plaintiff, is a property right, and the courts will restrain an imitator to prevent deception of the public and damage to plaintiff.
- (3) By copying plaintiff's patterns and selling them under plaintiff's trade names, defendants have violated plaintiff's rights; their conduct constitutes unfair competition; it is an attempt to unjustly enrich themselves and to misappropriate plaintiff's good will and business.
- (4) The Trial Court had jurisdiction.
- (5) Each finding of fact made by the Trial Court is supported by the record and exhibits. There was no abuse of discretion.

THE RECORD COMPELS THE ISSUANCE OF INJUNCTION RESTRAINING DEFENDANTS.

Defendants' quibbling with words renders their brief so confused and self-contradictory that it falls flat and is of no help to either defendants or your Honors.

The following verified facts represent the record before the Trial Court and which impelled the Court to issue a preliminary injunction.

- (1) Plaintiff appropriated and used the specified trade names or trade marks to indicate the nature, quality and source of its china [R. 5]. These marks were **"first appropriated and used by plaintiff"** [R. 6 and 9; Wood Affidavit, R. 43].
- (2) These trade names, "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" "have acquired and represent a large and valuable good will and reputation and are associated with and recognized by the purchasing public as representing china originating with plaintiff." [R. 6; Affidavits of Elster, R. 26, 27; Stein, R. 34, and Delany, R. 46, 47.]
- (3) Plaintiff employed artists and developed distinctive and attractive patterns [R. 5]. These patterns were **"originated and popularized by plaintiff * * *"** [R. 6; Affidavit of Wood "distinctive patterns originated by deponent's corporation," R. 39].
- (4) These distinctive patterns were recognized by the public as indicating plaintiff's china [R. 6; Affidavits of Elster, R. 26, 27; Robertson, R. 35, 36; Delany, R. 47].

(5) Defendants copied plaintiff's patterns, marked their containers with the same trade marks as used by plaintiff and referred to the china by plaintiff's names. [Compare Exs. 1 and 2, R. 12 and 13; compare Exs. 5 and 6, R. 16 and 17; compare Exs. 9 and 10, R. 56 and 57.] “* * * china sold by defendants bears a willful, deceptive copy of plaintiff's original patterns and is a fraud upon the purchasing public, * * *” [R. 7]. “* * * the sale of china by defendants under the trade names first appropriated and used by plaintiff is calculated to deceive the public * * *” [R. 9; Affidavits of Elster, R. 26-27; Delany, R. 49].

(6) The purchasers have been deceived [Affidavits of Robertson, R. 36; Wood, R. 49] and plaintiff has been damaged [R. 8 and 9; Affidavits of Elster, R. 29; Wood, R. 41 and Delany, R. 49-50].

In addition to these facts, the Trial Court had before it the physical, uncontroverted exhibits and the testimony of Messerschmitt to the effect that he had made the cylinders for the “Shadowleaf” pattern for plaintiff and **later made similar cylinders for defendants** [R. 124], admitting

“I would say that a duplication of that pattern is very close” [R. 125].

This action is based upon the principle that equity will not permit one to unjustly enrich himself at the expense of another. It involves overreaching and taking an unconscionable advantage.

Defendants' acts constitute an appropriation of plaintiff's property rights in its trade names and in the dress of its goods.

The Trial Court properly issued a preliminary injunction in the light of the authorities. The Court should not permit plaintiff's good will to be diluted and ultimately destroyed by defendants' unlawful acts.

"* * * if the complainants be not protected by preliminary injunction against such use—if, in other words, that question be postponed to the final hearing—there is every inducement to the defendant to delay and prolong the litigation, continuing meanwhile the assaults upon the good will of the complainants, so that, even if final decree be at last rendered in favor of complainants, the good will will have been so seriously and irreparably injured, if not in great measure destroyed, as to leave the complainants practically without remedy."

Garrett & Sons v. T. H. Garrett & Co., 78 Fed. 472, at 479 (C. A. 6).

EACH FINDING OF FACT IS SUPPORTED BY THE RECORD BEFORE THE TRIAL COURT.

Defendants do not question plaintiff's existence as a corporation nor the fact that defendants are partners doing business as Technical Porcelain & Chinaware Co. [Findings 1 and 2, R. 83-84].

Defendants do not question that plaintiff manufactures the four patterns of hotel china in question and sells them in interstate commerce [Finding 4, R. 84] as alleged in the verified complaint [R. 4]. The sale in interstate commerce by plaintiff is confirmed in the affidavit of Wood [R. 38 and 41] and the affidavit of Delany [R.

45, 47]. Defendants sell hotel china in interstate commerce and in competition with plaintiff. Defendants' sale in interstate commerce is alleged in the verified complaint [R. 8] and substantiated by the affidavit of Clifford [R. 53]. This is not denied.

Finding 5 is not controverted. Plaintiff has adopted and used the trade names "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" [R. 5; Wood Affidavit, R. 39; Delany Affidavit, R. 47].

Finding 6 is convincingly supported by the record. Defendants do not question that Exhibits 3, 9, 11 and 13 correctly represent chinaware bearing patterns sold by plaintiff under the names "Shadowleaf," "Tweed," "Hibiscus" and "Magnolia" [Delany Affidavit, R. 47]. That these patterns were produced by plaintiff's artists and at plaintiff's expense is alleged in the verified complaint and supported by the affidavit of Wood [R. 39-40]. These trade marks are applied to the containers in which the hotel china is shipped as exemplified by Exhibit 2 [R. 16] and advertising matter, Exhibit 8 [R. 31].

These patterns and trade marks are well known in the trade and represent good will and reputation of plaintiff. They are recognized in the trade as indicating origin of the china in plaintiff [Affidavits of Wood, R. 38-39; Delany, R. 47 and Clifford, R. 52-53].

Finding 7 to the effect that defendants caused plaintiff's patterns to be copied and imitated and have sold such copies in interstate and intrastate commerce is also supported in the record. The physical exhibits afford irrefutable evidence of copying.

For many years plaintiff had had Garnier Engraving Co. of Los Angeles engrave certain cylinders or rollers

which plaintiff then used in making paper pattern transfers, such transfers being eventually applied to the hotel china. Mr. Messerschmitt, a partner of this engraving company, testified that he made a roll or cylinder for printing the "Shadowleaf" pattern for defendants long after plaintiff had the same pattern [R. 123-124]. Your Honors are asked to compare Exhibits 1 and 2 [R. 12 and 13]; one of these is plaintiff's and the other is the defendants'. It is evident that defendants' copy is a Chinese copy of plaintiff's pattern in general appearance, in arrangement of primary or foreground leaves, in arrangement of background leaves and even in minute details of shadowing.

"The only adequate explanation I can find for this almost exact reproduction of non-functional features is that the *defendant has set out deliberately to appropriate the business of plaintiff's customers*. And that it is in a fair way to do so, unless prevented by injunction, is reasonably clear from the affidavits submitted on this motion."

Thayer Telkee Corp. v. Davenport-Taylor Mfg. Co., 46 F. 2d 559, 560.

Such slavish copying has deceived plaintiff's customers [Robertson Affidavit, R. 36].

The evidence also establishes that "Tweed," "Hibiscus," and "Magnolia" have been copied. For "Tweed," compare Exhibit 9 [R. 56, plaintiff's] with Exhibit 10 [R. 57. defendants']; for "Hibiscus" compare Exhibit 11 [R. 58] with Exhibit 12 [R. 59]; for "Magnolia" compare Exhibit 13 [R. 60] with Exhibit 14 [R. 61]. Substantial identity by this similarity is confirmed by the affidavits of Elster [R. 27-28], Robertson [R. 36], Delany [R. 49] and Clifford [R. 53].

The evidence therefore supports finding 7; Conclusion of Law V [R. 87] must follow in accordance with the authorities.

The Court found, in finding 8 [R. 85], that defendants have identified and referred to their copies of plaintiff's patterns by plaintiff's own trade names. This finding is based upon the record. Exhibit 7 is a copy of defendants' price list which shows on its face that defendants have sold and offered for sale hotel china under the names "Shadowleaf," "Tweed" and "Hibiscus." Exhibit 6 [R. 17] shows on its face that defendants have used plaintiff's trade marks on their shipping containers.

In view of these uncontrovertible facts, Conclusions of Law IV and V are the only conclusions that can be reached.

The Court also properly found [Finding 9, R. 86] that defendants were notified [R. 104] and persisted in continuing their acts in unfair competition. In order to prevent irreparable damage to plaintiff, the Trial Court issued a preliminary injunction.

Since every finding of fact finds ample support in the record, the findings must be affirmed.

Attention is called to the fact that the preliminary injunction was only directed to four specific patterns and four trade names. The injunction leaves defendants free to manufacture and sell the forty other patterns, colors, and styles listed on defendants' price list, Exhibit 7 [R. 18]. The injunction is therefore limited. It is necessary to protect plaintiff's good will, reputation and business; it did not cripple defendants by simply restraining them from reaping where they did not sow; it prevented defendants from unjustly enriching themselves at the expense of plaintiff.

FEDERAL COURTS HAVE JURISDICTION OF
ACTIONS FOR UNFAIR COMPETITION
WHERE INTERSTATE COMMERCE IS AF-
FECTED.

Defendants' attack upon the jurisdiction of the District Court in this case is not made in good faith, because defendants have admitted

"*Stauffer v. Exley* is the leading case and the controlling case." [R. 105.]

"I realize that is the law of this case." [R. 115.]

Furthermore, defendants' answer and counterclaim filed herein states, on page 4, lines 31-32:

"3. This Court has jurisdiction under the Lanham Act of July 5, 1946, 15 U. S. C. A. §§1051-1127."

Honorable Circuit Judge Orr, speaking for your Honors (Chief Judge Denman and Circuit Judge Pope) conclusively determined the jurisdiction of Federal Courts under the Lanham Act in the case of *Stauffer v. Exley*, 184 F. 2d 962. The instant case is on all fours with the *Stauffer* case.

In the *Stauffer* case it was found that Stauffer was engaged in interstate commerce and used an **unregistered trade name**, "*Stauffer System*" (at 963). Here, the plaintiff Wallace is engaged in interstate commerce and uses unregistered trade names or trade marks [Paragraphs 4 and 6, Verified Complaint; R. 4 and 5; also Affidavits of Elster, R. 26; Wood, R. 38, and Delany, R. 45. 47.]

In the *Stauffer* case your Honors stated:

"Under the present Act, however, it need only be proved that the infringer has used the copy or imi-

tation in commerce which Congress has the power to regulate. An infringement committed in intrastate commerce but affecting interstate commerce could clearly be regulated by Congress and thus would be within the present Act.” (at 966)

Defendants’ brief does not deny the fact that defendants have sold the unlawful copies under plaintiff’s trade names in interstate commerce. The Trial Court had before it the verified complaint and affidavits in which such acts by defendants are alleged: “* * * used by defendants upon china sold by defendants in interstate and intrastate commerce.” [R. 7 and affidavit of Clifford, R. 53.] Defendants’ price lists, such as Exhibits 7 [R. 18 and 19] have been distributed interstate.

The facts in the instant case are stronger than those in the *Stauffer* case, because in addition to actual misappropriation of plaintiff’s trade marks, we here have a defendant who deliberately copied the designs and appearance of the goods by duplicating the patterns originated by plaintiff. This results in deception and confusion of purchasers. It is squarely within the prohibition of the Paris Convention which states in Article 10, Bis:

“(2) Every act of competition contrary to honest practice in industrial or commercial matters constitutes an act of unfair competition.

“(3) The following particularly are to be forbidden:

“1°. All acts whatsoever of a nature to create confusion by no matter what means with the establishment, the goods, or the services of the competitor; * * *.”

These provisions are part of the Lanham Act, because 15 U. S. C. A. § 1127 states:

“The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; * * * and to provide rights and remedies stipulated by treaties and conventions respecting trade marks, trade names and unfair competition entered into between the United States and foreign nations.”

Since *Stauffer v. Exley* is admittedly the law of this case and by reason of the clear language of the Act itself, pages 12-23 of defendants-appellants' brief are a baseless and false argument and can be disregarded.

Reaffirmation of the jurisdictional authority is also to be found in 15 U. S. C. A., Sec. 1121, which specifically provides that the District Courts of the United States shall have original jurisdiction:

“* * * of all actions arising under this chapter, without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties.”

as well as in 28 U. S. C. A. § 1337 which states:

“District courts shall have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.”

Defendants cannot question the power of the District Court to issue an injunction. It is therefore submitted that the Trial Court had jurisdiction and, in view of the facts before it, properly issued the preliminary injunction restraining the defendants from their unlawful use of plaintiff's marks and from the misappropriation of plaintiff's distinctive patterns which imparted a characteristic and unique dress to their chinaware.

THE PRINCIPLES APPLICABLE TO THIS CASE ARE ENUNCIATED BY THE FOLLOWING AUTHORITIES AND WERE PROPERLY APPLIED BY THE TRIAL COURT.

- (1) Trade Marks and Trade Names Constitute a Property Right and Represent Good Will. Plaintiff's Rights Require Protection.

"The redress that is accorded in trade mark cases is based upon the party's right to be protected in the good will of a trade or business. * * * Courts afford redress or relief upon the ground that a party has a valuable interest in the good will of his trade or business, and in the trade marks adopted to maintain it."

Hanover Star Milling Co. v. Metcalf, 240 U. S. 403, 412.

Also see:

Tillman & Bendel v. California Packing Corp., 63 F. 2d 498 (C. A. 9);

Carolina Pines v. Catalina Pines, 128 Cal. App. 84;

Lane-Bryant Inc. v. Maternity Lane Ltd., 173 F. 2d 559;

Banzhof v. Chase, 150 Cal. 180;

Safeway Stores Inc. v. Dunnell, 172 F. 2d 649 (C. A. 9).

"It is also to be borne in mind that the rules of unfair competition are based not alone upon the protection of a property right existing in the complainants, but also upon the right of the public to protection from fraud and deceit. (*Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F. (2d) 603.)"

American Philatelic Soc. v. Claibourne, 3 Cal. 2d 689, at 698, 46 P. 2d 135.

(2) **The Use of Identical Trade Marks by Defendants Raises the Presumption of Fraud by Defendants.**

“* * * Just why the defendant should endeavor to sell its product under names so strikingly similar to those long employed by the plaintiffs, is not readily discernible, unless it was for the purpose of capitalizing upon the good will and reputation of the plaintiffs.”

Weiner v. National Tinsel Mfg. Co., 123 F. 2d 96, 98 (C. A. 7).

“The decisions frequently refer to this sort of imitation as ‘reaping where one has not sown’ or as ‘riding the coattails’ of a senior appropriator of a trade name.

“By whatever name it is called, equity frowns upon such business methods, and in proper cases will grant an injunction to the rightful use of the trade name.”

Stork Restaurant, Inc. v. Sahati, 166 F. 2d 348, 357 (C. A. 9).

(3) **Plaintiff Has a Property Right in the Patterns Originated and Used by Plaintiff on Its Goods.**

“* * * There is no dispute between plaintiff and defendant as to the law that the plaintiff is entitled to recover in an action for unfair competition when the defendant, a competitor, has unnecessarily and knowingly imitated his rival’s devices to such an extent that purchasers are likely to be deceived by the resemblance of the devices, and where the general appearance of the devices are practically the same,

unless the points of resemblance are the necessary result of functional requirements. *Rushmore v. Manhattan Screw & Stamping Works (C. C. A.)*, 163 F. 939, 19 L. R. A. (N. S.) 269; *Lovell-McConnell Mfg. Co. v. American Ever-Ready Co. (C. C. A.)*, 195 F. 931; *Rushmore v. Badger Brass Mfg. Co. (C. C. A.)*, 198 F. 379.”

McGill Mfg. Co. v. Leviton Mfg. Co., 43 F. 2d 607, 608.

Also see:

Wm. H. Keller, Inc. v. Chicago Pneumatic Tool Co., 298 Fed. 52, 57 (C. A. 7);

Krem-Ko Co. v. R. G. Miller & Sons, Inc., 68 F. 2d 872 (C. A. 2);

Stewart v. Hudson, 222 Fed. 584, 587;

Baldwin et al. v. Grice Bros. Co., 215 Fed. 735, 737.

“It has been held to apply to misappropriation as well as misrepresentation, to the selling of another’s goods as one’s own—to misappropriation of what equitably belongs to a competitor. *International News Service v. Associated Press*, 248 U. S. 215, 241, 242, 63 L. Ed. 211, 221, 222, 39 S. Ct. 68, 2 A. L. R. 293. Unfairness in competition has been predicated on acts which be outside the ordinary course of business and are tainted by fraud, or coercion, or conduct otherwise prohibited by law.”

Schechter v. U. S., 295 U. S. 531, 532, 79 L. Ed. 1570, 1581.

(4) Injunctive Relief Is Granted When a Defendant Copies the Appearance of Plaintiff's Article and Appropriates Good Will Associated Therewith.

Note that in the instant case, the decoration or patterns originated by plaintiff impart eye-appeal and salability to the china.

In each of the following cases injunctions were issued because the appearance of an article had been copied by the defendant:

Rymer v. Anchor Stove & Range Co., 70 F. 2d 386 (C. A. 6) (stove);

Buck's Stove & Range Co. v. Kiechle, 76 Fed. 758 (stove);

Enterprise Mfg. Co. v. Landers, Frary & Clark, 131 Fed. 240 (C. A. 2) (grinding mill);

Art Metal Works v. Cunningham, 137 Misc. 429, 242 N. Y. Supp. 294 (lighters and atomizers);

George G. Fox Co. v. Wm. J. Glynn, 191 Mass. 344 (loaf of bread);

Yale & Towne Mfg. Co. v. Alder, 154 Fed. 37 (C. A. 2) (padlock);

Rushmore v. Manhattan Screw & Stamping Works, 163 Fed. 939 (spotlight);

Lovell-McConnell Mfg. Co. v. American Ever-Ready Co., 195 Fed. 931 (auto horn);

Wesson v. Galef, 286 Fed. 621 (decoration on revolver);

Socony-Vacuum Oil Co. v. Rosen, 108 F. 2d 632 (C. A. 6) (appearance on container);

F. W. Fitch Co. v. Camille, Inc., 106 F. 2d 635 (C. A. 8) (hosiery package);

My-T-Fine Corp. v. Samuels, 69 F. 2d 76 (padding package);

Luminous Unit Co. v. R. Williamson & Co., 241 Fed. 265, *affd.* 245 Fed. 988 (lighting fixture);

Ilg Electric Ventilating Co. v. Evry-Use Products, Inc., 21 Fed. Supp. 845 (ornamentation on a blower);

Prince Matchabelli v. Anhalt & Co., 40 Fed. Supp. 848 (appearance of purse kit);

Thayer Telkee Corp. v. Davenport-Taylor Mfg. Co., 46 F. 2d 559 (appearance of a key cabinet);

Chesebrough Mfg. Co. v. Old Gold Chemical Co., 70 F. 2d 383 (C. A. 6) (cartons and labels);

Grant v. California Bench Co., 76 Cal. App. 2d 706 (waiting bench).

“The question is whether the natural and probable result of the use by the defendants of its label will be the deception of the ordinary purchaser, making his purchases under ordinary conditions * * *.”

Notaseme Hosiery Co. v. Straus, 201 Fed. 99, 100 (C. A. 2).

(5) A Fraudulent Intent Is Presumed From the Identity in Appearance and Words.

In cases of unfair competition

“* * * the question of intent to deceive is involved though it is not necessary to prove it by direct evidence. It may be inferred from circumstances and will be presumed where the resemblance is patent and the probability of confusion obvious.”

Socony-Vacuum Oil Co. v. Rosen, 108 F. 2d 632, 636 (C. A. 6).

“* * * It is elementary law that, when the simulation of well-known and distinctive features is so close, the court will assume that defendants intended the result they have accomplished, and will find an intent to appropriate the trade of their competitor, * * *.”

Enterprise Mfg. Co. v. Landers, Frary & Clark,
131 Fed. 240, 241 (C. A. 2).

“A person intends the ordinary consequence of his voluntary act.”

Calif. Code Civ. Proc., Sec. 1963(3).

THE CASES CITED BY DEFENDANTS ARE NOT PERTINENT.

Decisions of an administrative official of the Patent Office (*Ex parte American Map Co.*) or those relating to the registrability of a word (*In re Lyndale Farm*) such as the geographic word “Lackawanna” in *Canal Co. v. Clark*, are of no value or interest here.

Chamberlain v. Columbia Pictures Corp., 186 F. 2d 923, reiterates the rule of the *Stauffer* case; it affirmed an order dismissing the complaint because there was no direct injury to rights of the plaintiff, and defendant’s acts did not result in the sale of goods as those of plaintiff because plaintiff’s purported rights and defendant’s motion picture were entirely non-competing and unrelated. In the instant case there is direct competition—both parties sell hotel china to the same dealers and there has been deception of purchasers.

The instant case has no similarity to an action to cancel trade marks like “Goldilocks” or “Red Riding Hood”

for dolls (names applied to dolls for over fifty years), as in *Dollycraft Co. v. Nancy Ann Storybook Dolls*. Plaintiff, in *Verney Corp. v. Rose Fabric Corp.*, 87 Fed. Supp. 802, had elected to avail itself of protection under Copyright laws but failed to apply the copyright notice and thereby lost its rights; that is not the case here.

Plaintiff has no quarrel with the United States Supreme Court cases cited by defendants; each case is bottomed on its own facts; their facts are totally different from those in the instant case.

The only pertinent case referred to by the defendants is *Wilson & Co., Inc. v. The Best Foods, Inc.*, 300 Fed. 484 (C. A. 9); this case is quoted hereafter.

THE ISSUANCE OF AN INJUNCTION IS DISCRETIONARY WITH THE TRIAL COURT AND IS NOT DISTURBED UNLESS TOTALLY UNSUPPORTED BY THE RECORD.

The above rule has been reiterated by many Courts of Appeal, including the Ninth Circuit. It is submitted that the present appeal should be dismissed with costs herein awarded to plaintiff, because defendants knew this rule full well and cited *Wilson & Co., Inc. v. The Best Foods, Inc.*, 300 Fed. 484 (C. A. 9), in its brief. The *Wilson* case involved a complaint for trade-mark infringement and unfair competition. Upon motion, the trial court granted a preliminary injunction and defendant appealed, as here. Your Honors affirmed the propriety of the injunction and stated:

“Upon such a question the well-settled rule is that the appellate court will not reverse the order of the court below unless it is made to appear that the court

abused the discretion with which it was invested. The decisions to that effect are so numerous that it will be enough to cite two made by this court. *Southern Pacific Co. v. Earl*, 82 Fed. 690, 27 C. C. A. 185; *Twenty-One Mining Co. v. Original Sixteen to One Mine, Inc.*, 240 Fed. 106, 110, 153 C. C. A. 142.” (P. 486.)

* * * * *

“* * * that the similarity of the trade-marks and cartons of the respective parties was such that the court below cannot be properly held to have abused its discretion in granting the preliminary injunction complained of. * * *” (P. 488.)

Even more direct language was used by your Honors in *Owens v. Perkins Oil Well Cementing Co.*, 2 F. 2d 247, wherein the following was quoted with approval:

“‘The granting or dissolution of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction, and, where that court has not departed from the rules and principles of equity established for its guidance, *its orders in this regard may not be reversed by the appellate court without clear proof that it abused its discretion*. The question is not whether or not the appellate court would have made or would make the order. It is to the discretion of the trial court, not to that of the appellate court, that the law has intrusted the power to grant or dissolve such an injunction, and the question here is: Does the proof clearly establish an abuse of that discretion by the court below?’ *American Grain Separator Co. v. Twin City Separator Co.*, 202 F. 202, 206, 120 C. C. A. 644, 648.

“‘A *pendente lite* injunctive order will not be reversed unless there was an abuse of discretion; and

this can only appear from an obvious misunderstanding of the facts or a palpable misapplication of well-settled rules of law on the part of the trial judge.' City of Chicago v. Fox Film Corp., 251 Fed. 883, 164 C. C. A. 99. See, also, Wilson & Co. v. Best Foods, Inc. (C. C. A.), 300 F. 484."

SUMMARY AND CONCLUSION.

It is respectfully submitted that:

- (1) The Trial Court had jurisdiction and had the power to grant a preliminary injunction;
- (2) The findings are amply supported by the record;
- (3) The rules of law have been correctly applied by the Trial Court;
- (4) There was no abuse of discretion by the Trial Court;
- (5) The judgment of the Trial Court should be affirmed; and
- (6) Plaintiff should be awarded all costs incurred in this baseless appeal, since the record shows that defendants-appellants knew the applicable rules of law and apparently presented this appeal only for purposes of harassment and delay.

Dated at Los Angeles, California, this 22nd day of January, 1952.

Respectfully submitted,

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Attorneys for Plaintiff-Appellee.

No. 13,094

IN THE
United States
Court of Appeals
For the Ninth Circuit

ANTONE PAGLIERO and ARTHUR PAGLIERO,
general partners doing business as
Technical Porcelain & Chinaware Co.,
Defendants-Appellants,

VS.

WALLACE CHINA Co., LTD., a Corporation,
Plaintiff-Appellee.

Appellants' Reply Brief

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FILED

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Plaintiff-Appellee.

Appellants' Reply Brief

Appellants believe that this reply brief can best serve the purpose of helpfulness by dividing the discussion into three parts: Part I—Uncontroverted facts and law, Part II—Wallace errors in stating the record, and Part III—Fallacies of the Wallace arguments. Part I treats the Federal cause of action for trade-mark infringement separately from the Federal cause of action for unfair competition.

PART I.

**Facts and Law with Respect to the Trade-Mark Cause of Action
Not Challenged or Controverted by Wallace**

(1) Tepco has stated as a fact that *no trade-mark is involved in this litigation*, that there are no allegations directed to trade-marks either in the complaint, in the motion for preliminary injunction, or in the supporting affidavits, or in the order to show cause (Tepco brief, p. 14). This position is not challenged nor can it be controverted by reference to this record.

(2) Whatever the names "Hibiscus," "Magnolia," "Tweed" or "Shadowleaf" may be characterized in legal parlance, they are not registered trade-marks and so *no registered trade-marks are involved in this case*. This latter was the holding of the Trial Judge (R. 84).

These facts being admittedly true, and there being no diversity of citizenship, the Court was without jurisdiction to adjudicate ownership, validity or infringement of a trade-mark. It is axiomatic that if there is no registered trade-mark under the Lanham Act, there is no jurisdiction under the Lanham Act for trade-mark infringement. It is just that simple.

In *Old Reading Brewery, Inc. v. Lebanon Co.*, F.S.; 92 U.S.P.Q. 38 (D.C., Penn.), suit was brought for infringement of the trade-mark "Old Reading Beer" and for infringement of plaintiff's exclusive right in and to phrases and trade-marks used to identify plaintiff's beer, such as "Pennsylvania Dutch" and "Traditionally Pennsylvania Dutch"; it was further alleged that such acts constituted unfair competition. The question of Federal jurisdiction arose on plaintiff's motion to remand the case to

the state court. As to the trade-mark cause of action it was held (p. 40):

“There being no allegations that the alleged infringement involves a registered trade mark, such alleged infringement presents no substantial federal question. In the absence of diversity of citizenship or a registered trade mark, this Court is without jurisdiction to adjudicate the validity or infringement of such trade mark, * * *”

In *Allen v. Barr*, 93 F.S. 589; 87 U.S.P.Q. 194 (D.C., Mich.), suit was brought for infringement of an unregistered, descriptive trade-mark and for unfair competition. On the trade-mark cause of action, the Court held (p. 597):

“There being neither diversity of citizenship nor a registered trade mark under any Act of Congress present here, this Court is without jurisdiction to adjudicate the validity or infringement of plaintiff’s trade mark.”

(3) The names “Hibiscus”, “Magnolia”, “Tweed” and “Shadowleaf” are not used by Wallace to indicate source of origin but merely to identify certain designs and distinguish one design from another (Tepco brief, pp. 14-15). This position is conceded by Wallace as shown by its brief, p. 3:

“These trade names are used in identifying specific and distinctive patterns originated by Plaintiff.”

This is confession that Wallace used these names only to identify and distinguish one design from another and not to indicate source of origin of the product or distinguish Wallace products from those of others as required by the Lanham Act.

Words which are incapable of indicating origin and merely identify the product or some characteristic of the product cannot function as trade-marks. See *Ex parte Inter-state Bakeries*, 91 U.S.P.Q. 340, where the words "Honey Wheat" were refused registration under the Lanham Act because they merely described the principal ingredients and could not indicate the origin of the product.

(4) Although Wallace refers throughout its brief to the names "Hibiscus", "Magnolia", "Tweed" and "Shadowleaf" as "trade names", these names do not come within the definition of trade names under the Lanham Act (Tepco brief, pp. 19-22). No effort is made by Wallace to show that these names identify Wallace's business, vocation, or occupation as required by 15 U.S.C.A. § 1127 to qualify them as *bona fide* trade names.

(5) Tepco has charged that the words "Hibiscus", "Magnolia", "Tweed" and "Shadowleaf" are generic descriptive words which are incapable of exclusive ownership. These words describe the designs in the very words that the public has used to describe similar designs for many years. It would be unthinkable for anyone to obtain the exclusive right to or a private monopoly in the words "California Poppy" to describe a design which is a representation of a California Poppy, and yet that is precisely Wallace's position. Its only showing of its alleged ownership is its adoption and use of these words. Mere adoption and use of such words as a matter of law does not establish exclusive ownership.

Courts guard the public and other manufacturers against the establishment of a trade-mark or a trade name monopoly taken from the existing vocabulary.

(6) Of real importance also is that Wallace does not deny the principle, or the applicability of the rule announced by the Supreme Court in *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485 (Tepco brief, pp. 22-23 and 38-39). Wallace attempts to distinguish this case by saying that it differs on its facts. However, the differences are not pointed out. If there be differences of fact, and there are because every case presents different facts, it is the rule of law which is applicable here. The rule enunciated by the Supreme Court is, that if a bill is obviously devoid of equity upon its face, and the defect is incapable of remedy by amendment, then the Court of Appeals may order the dismissal of the complaint, upon an appeal from an order granting a temporary injunction, before an answer is filed or proof taken. Nothing could be clearer than that this rule is applicable to this case, as there is no equity in the complaint for Federal trade-mark infringement where no Federal trade-mark is even alleged. No amendment can cure this fatal defect as the Trial Court found no Federal registered trade-mark is involved in this suit.

**Facts and Law Not Challenged by Wallace in Connection
with the Unfair Competition Cause of Action**

(1) Wallace states that jurisdiction of the unfair competition cause of action is based upon this Court's opinion in *Stauffer v. Exley*. Wallace states in its brief, p. 2, as follows:

"It is submitted that the question of jurisdiction has been conclusively determined by this Court's ruling in *Stauffer v. Exley*, 184 F.2d 962 (C.A. 9)."

and on p. 12 it said that the Judges of this Court:

"conclusively determined the jurisdiction of Federal

Courts under the Lanham Act in the case of *Stauffer v. Exley*, 184 F.2d 962. The instant case is on all fours with the Stauffer case.”

Thus, if this Court agrees with Tepco (Tepco brief, pp. 23-27), that this case does not come within the facts of the *Stauffer* case, that Wallace does not have the exclusive right to the subject matter of this suit, then Wallace admits it is out of court.

(2) Wallace does not deny and in effect concedes that these four designs are used merely for decorating hotel china and, therefore, property in them can only be obtained by following the statutory requirements for design patent protection or for copyright protection.

(3) Wallace does not deny and in effect concedes that these four designs are neither protected by Design Letters Patent or by copyright and that the time for so protecting them long since passed. It could not deny this for this was the holding of the Trial Court (R. 85).

(4) It does not and cannot deny and therefore concedes that it voluntarily put each of these designs into commerce without any statutory protection. While Wallace does claim the property right in each of these designs, it does not deny that the exclusive rights to these designs are lost and pass into the public domain merely by voluntarily placing them in commerce without statutory protection.

(5) Wallace does not deny and in effect concedes that the copying of designs in the public domain is neither unfair nor unlawful.

(6) It does not now and never has denied and therefore concedes that the copying of unpatented designs used to decorate china has been practiced in the industry by itself,

as well as others, with substantial benefit to the public (R. 77, Defs. Ex. G, H).

(7) Wallace does not deny and in effect concedes that Tepco, as well as itself, sells only to dealers and further that dealers are familiar with the manner of marking china-ware and indicating the source of manufacture. All Tepco products are individually marked with Tepco's trademark and so each dealer and each purchaser has at all times the customary means for correctly identifying the products at Tepco's (R. 72, 79).

(8) Wallace does not deny and accordingly concedes that there has never been any passing-off of Tepco's products as and for Wallace's products nor is any passing-off alleged in the complaint. It does state that there has been confusion in one or two instances and this is treated later in this brief (see *infra*, p. 10). The fact still stands that there has never been any fraud or deceit by Tepco and there never has been a sale of Tepco products as and for Wallace's products.

(9) Of great significance is the fact that Wallace does not now deny that it is seeking a monopoly in these designs in perpetuity and in contravention of the Design Patent Laws of the United States, as set forth in the Tepco brief, p. 33.

(10) Also of importance is that Wallace does not deny the rule announced in the *Mast, Foos* case, 177 U.S. 485, 495, and its applicability to the unfair competition cause of action (Tepco brief, p. 39). It passes off the reference to this case with a statement that the principle is correct but the facts are different, without making any effort to show what the facts were or how they differ. The principle of

the *Mast, Poos* case is that a Court of Appeals could, on an appeal from an order granting a preliminary injunction, not only reverse the order for the injunction, but dismiss the complaint prior to the taking of any testimony or the filing of an answer. That is precisely the situation here and the rule is applicable to this case. There is no equity in the complaint for unfair competition and the defects cannot be cured by amendment.

With these important facts and propositions of law in both causes of action not in dispute or controverted by Wallace, much of the Court's labors in connection with this appeal are eliminated.

PART II.

Wallace Errors in Stating the Record

The second part of this brief is devoted to the errors made by Wallace in stating the facts in the record. In most instances they are iterated and reiterated several times, presumably in the useless hope that mere repetition will make them true.

(1) The Wallace brief, although asserting that the four names "Hibiscus", "Magnolia", "Tweed", and "Shadowleaf" are merely trade names, presents a studied confusion and recurrent reference to these same four names as *trade-marks*. The Court will observe that whenever they are referred to as trade-marks, no reference to the record is made, or if made, the record does not support the statement. For example, Wallace brief, p. 3:

"Plaintiff was the first to appropriate certain *trade marks* or trade names for the identification of its china, the names in question being 'Shadowleaf,' 'Tweed,' 'Hibiscus' and 'Magnolia'".

"Plaintiff appropriated and used these specific trade names or *trade marks* to indicate the nature, quality and source of its china (R. 5)." Wallace brief, p. 6.

"Defendant copied plaintiff's patterns, and marked their containers with the same *trade marks* as used by plaintiff * * *" Wallace brief, p. 7.

"These *trade marks* are applied to the containers in which the hotel china is shipped * * *" Wallace brief, p. 9.

"These patterns and *trade marks* are well known in the trade and represent good will and reputation of plaintiff." Wallace brief, p. 9.

"in addition to actual misappropriation of *plaintiff's trade marks* * * *" Wallace brief, p. 13.

"The Use of Identical Trade Marks by Defendants * * *" Wallace brief, p. 16.

The repetition is sufficient to indicate that reference to Wallace ownership of *trade-marks* was not accidental or mere inadvertence.

On the contrary, the allegations are as follows: In the Complaint (R. 5):

"6. Plaintiff alleges that it used and is using distinctive trade names or trade marks to indicate the nature, quality and source of its china; *that among the trade names so appropriated and used by plaintiff are 'Shadowleaf,' 'Tweed,' 'Hibiscus' and 'Magnolia';* that plaintiff uses the said trade names in connection with its china bearing distinctive patterns and applies said trade names to containers in which said china is shipped and sold * * *"

"That Exhibit 1, attached hereto, is a pattern transfer originated by plaintiff and known by the trade name 'Shadowleaf' * * * (R. 6).

"8. Plaintiff alleges that the various trade names and each of them appropriated and used by plaintiff * * *" (R. 6).

"that defendants have copied various of plaintiff's original patterns, including the patterns known by the trade names 'Shadowleaf,' 'Tweed,' 'Hibiscus' and 'Magnolia' * * *" (R. 7).

"Plaintiff alleges that the sale of china by defendants under the trade names first appropriated and used by plaintiff * * *" (R. 9).

There is no reference or allegation in the complaint that these four names are trade-marks. There is also no reference to any trade-mark in the motion for preliminary injunction (R. 21-24) or in the supporting affidavits (R. 24-61) or in the order to show cause (R. 63-64).

(2) Wallace states with finality that purchasers have been deceived and confused by defendants. The Wallace brief says (p. 4):

"Former purchasers of plaintiff purchased defendants' copies, believing them to originate with plaintiff and then complained to plaintiff when the copies developed faults."

"The purchasers have been deceived." Wallace brief, p. 7.

"Such slavish copying has deceived plaintiff's customers." Wallace brief, p. 10.

"This results in deception and confusion to purchasers." Wallace brief, p. 13.

To be sure, the complaint contains allegations that the acts of defendants deceived the public (R. 8) and are calcu-

lated to deceive the public and constitute palming off (R. 9). But these allegations do not establish a *prima facie* showing in view of the denial of the allegations.

The affidavit of Harold K. Robertson, who is an employee of one of Wallace's dealers in Long Beach, is principally relied upon by Wallace to establish the fact of confusion. The affidavit is the hearsay report of one instance which is not identified as to time, place, name or in any other manner. Being completely hearsay, there is no way to test its truth and the statement is said to be supported in the Wood affidavit. However, in checking the record reference, the page is to the Delaney affidavit and not to Wood. Wood, who was president of Wallace, merely stated (R. 42) that he:

"has examined china manufactured and sold by Tepco and bearing said pattern and deponent states that the Tepco ware is deceptively similar to the ware manufactured and sold by Wallace China Co., Ltd. and deceives the public into the belief that the copies are products made by deponent's corporation."

This, obviously, is merely the expression of an opinion and is not founded on any facts. Mr. Delaney is Sales Manager for Wallace and a highly prejudiced affiant. Without in any way identifying what patterns were involved, this affiant merely states (R. 49) that he:

"personally knows that Tepco has sold its copies to restaurants which originally bought Wallace china and that said restaurants were deceived in believing that what they bought from Tepco was a product of Wallace China Co., Ltd.;"

To be sure, the inference is that the statement relates to the four patterns here in suit, but it is a serious matter to grant an injunction and stop a man's business on the basis of inference which has the further fatal defect of being merely hearsay. Here again the statement is of no probative value.

It is upon these, and only these unsupported, hearsay and vague statements that Wallace claims to have made a showing of confusion in the trade. It does not deny and never has denied that all Tepco products bear the Tepco trade-mark and that every purchaser has in his hands, accurate and unassailable means for identifying the source of origin of each piece in the accepted and customary manner so there could not be any fraud or deceit. Likewise it must be remembered that the purchasers are experts—dealers—and are thoroughly familiar with the trade-marks and markings of manufacturers. It does not deny that purchasers may be mistaken and confused without any legal or moral wrong. *Canal Co. v. Clark*, 80 U.S. 311, 327; *Kellogg Co. v. National Biscuit*, 305 U.S. 111. There must be accompanying fraud or deceit, which is not present in this case.

(3) Wallace, in its brief (p. 12), says that Tepco's attack on the jurisdiction of the District Court is not made in good faith because jurisdiction has been admitted, and refers this Court to two places in the record (one of which is incorrect) and to defendants' answer and counterclaim, which is not a part of this record.

If the Court will examine the first reference to the record (R. 105), it will see that this remark was made by counsel during defendants' request for a short extension of time for the hearing on the preliminary injunction. One of the

grounds being urged was the Court's lack of jurisdiction and time to thoroughly research the principle enunciated in *Stauffer v. Exley*. In this connection, this Court is referred to an earlier portion of the record (R. 98). In Wallace's second reference (which should be R. 113), it will be observed that this subject was prefaced by the following quotation (R. 113):

"Now, as I indicated earlier, Your Honor, I think there is a very serious doubt as to the jurisdiction of this case."

And immediately following the quote referred to by Wallace, counsel stated (R. 113):

"But I think also in this case, the Stauffer case there was a distinguishing feature."

Tepco is confident that reference to the text of the record from which these two sentences were lifted will indicate to this Court which party is acting in good faith.

(4) The Wallace brief constantly states Tepco does not urge that the findings of fact and conclusions of law are in error. Samples of such a statement are found in the Wallace brief on pages 4, 8-11.

To show the utter preposterousness of these statements, all that is necessary is to compare Tepco's Concise Statement of Points (R. 144) and the Specification of Errors (Tepco brief, pp. 7-9) with the Findings of Fact and Conclusions of Law (R. 83):

Tepco point 1 (R. 144) and Specification of Error 1 (brief p. 7), with Finding 5 and Conclusion I.

Tepco point 2 (R. 144) and Specification of Error 2 (brief p. 7), with Finding 6 and Conclusion II.

Tepco point 3 (R. 145) and Specification of Error 3 (brief p. 8), with Conclusion III.

Tepco point 4 (R. 145) and Specification of Error 4 (brief p. 8), with Finding 8 and Conclusion IV.

Tepco point 5 (R. 145) and Specification of Error 5 (brief p. 8), with Finding 7 and Conclusion V.

Tepco point 6 (R. 145) and Specification of Error 6 (brief p. 8), with Conclusion VI.

Tepco can only conclude that this flagrant disregard of the record indicates either a complete confusion as to the facts and the law, or a deliberate attempt by Wallace to mislead this Court.

PART III.

Fallacies of the Wallace Arguments

Perhaps the fallacies of the Wallace arguments are best shown by reference to the heading "The Principles Applicable to This Case" (Wallace brief, p. 15) and the authorities which are said to support these principles.

(1) No one denies the general statement that trade-marks and trade names represent good will. But before there can be any property to protect and to which good will can attach, Wallace must first show that it has trade-marks or that it has trade names, and next, that it owns them exclusively. No trade-marks are alleged and so no good will can attach. What Wallace calls trade names in fact are not trade names (Tepco brief, pp. 19-22). Accordingly, Wallace has no property rights in trade-marks or trade names which can be protected by this Court.

(2) It is said that the use of identical trade-marks by the defendants raises a presumption of fraud (Wallace

brief, p. 16). There being no trade-marks involved in this case, there is no use of identical trade-marks which could give rise to any presumption. Likewise, there is no use of trade names which could give rise to constructive fraud.

(3) It is said that Wallace has a property right in the patterns which it originated and used (Wallace brief, p. 16). There can be no dispute that these four designs have no other purpose or function than to decorate hotel china and that such decoration does not in any way change the form, quality, size or shape of the merchandise. The law is, and has been since the case of *Patterson v. Commonwealth*, 97 U.S. 501; 24 L.Ed. 1115 as stated in the Tepco brief (p. 28), a man may protect his new designs by design patents or by copyright, and if he avails himself of the statutory protection he then secures a monopoly in them for a limited period of time, but if he does not, he has no right to exclude others from the free use thereof. Wallace did not see fit to avail itself of statutory protection but allowed its designs to go into the public domain. Accordingly, Wallace does not have the exclusive rights or ownership of these designs which are the subject matter of this suit.

What authority does Wallace show to support its position that it owns these designs? Merely that Wallace employed artists to make them. What ownership can there be apart from ownership authorized by statute and obtained by design patent or copyright when designs are used in commerce?

The cases cited as supporting the Wallace ownership of such designs do not do so. In *McGill Mfg. Co. v. Lebiton Mfg. Co.*, 43 F(2) 607, the District Court held that plain-

tiff's fixtures had acquired a secondary meaning due to the *shape and appearance*. There is no allegation, claim or finding of secondary meaning in the present case.

In *Keller, Inc. v. Chicago Pneumatic Tool*, 298 Fed. 52, 57 (C.C.A. 7) decorative designs were not involved, much less the question of exclusive ownership of designs by merely hiring artists to make them.

In *Krem-Ko Co. v. R. G. Miller and Sons, Inc.*, 68 F(2) 872 (C.C.A. 2), the only design involved was the patented design of a bottle which was held invalid. In view of the invalidity, it was further held that there was no unfair competition by defendant's use of this same bottle, even though he was a former employee and even though he used it, as the plaintiff did, for a chocolate drink, if the public was not deceived. The Court held there was no exclusive property right in the design of the bottle.

In *Stewart v. Hudson*, 222 Fed. 584, 587, no design features were involved and no pattern was before the Court.

In *Baldwin v. Grier Brothers*, 215 Fed. 735, 737, no decorative design or pattern was involved.

Schechter v. U. S., 295 U.S. 531, 532; 79 L.Ed. 1570, 1581 does not apply because there can be no misappropriation of a design which belongs to the public and freely available to everyone.

Wallace would not, or could not, and, in fact, did not secure the statements under oath required for design patent applications (35 U.S.C.A. §35, R.S. 4892) that the artists hired by it to make these four designs were in fact the originators of these designs.

(4) The matter of trade dress is not here involved. The correct rule of law in decorative unpatented designs and their use by the public is set forth in the Tepco brief, pp. 29-32.

In addition the decoration of an article of commerce, the trade dress cannot acquire the status of a trade-mark for the attachment of good will. In *Burgess Battery Co. v. Marzall*, F.S.; 92 U.S.P.Q. 90 (D.C., Dist. Col.—1951) the plaintiff sought to compel registration of the decorative appearance of its battery case as a trade-mark under the Lanham Act. In deciding against plaintiff, District Judge Youngdahl held (p. 91) :

“However, assuming arguendo, that *res judicata* does not bar plaintiff in this case, it seems clear that the design in question is merely the dress of the goods and is inherently incapable of acquiring the status of a trade mark under the 1946 Act.”

(5) Fraudulent intent is presumed from the identity in appearance and words (Wallace brief, p. 19). This, of course, is not the law. The law is, as indicated in the *Shredded Wheat* case, 305 U.S. 111, that where the unpatented design and the generic name for the article are both in the public domain, as is the case here, a person is only required to identify his products so as to reasonably distinguish them from those of other manufacturers. Tepco has identified its products with its own trade-mark and clearly and permanently marked its products to distinguish them from chinaware of other manufacturers.

(6) Wallace states “Unless defendants can show that the findings are in substantial error, the judgment must be affirmed” (Brief, p. 4). This is not the law and certainly it is not the law on questions of Federal Jurisdiction. Defendants do not have the burden of proof on the matter of jurisdiction. Since Federal jurisdiction is wholly statutory, the rule in the Federal Courts is that jurisdiction is never presumed, and the burden is on the plaintiff to prove

facts establishing the Court's jurisdiction. The correct rule is stated in the following Supreme Court cases:

In the opinion of Mr. Justice Hughes in *McNutt v. General Motors Accept. Corp.*, 298 U.S. 178; 80 L.Ed. 1135, it was held (p. 1141):

"The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. *They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor.* He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing.

* * * * *

"The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose *the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.*

* * * * *

"There was thus no showing that the District Court had jurisdiction and the bill should have been dismissed upon that ground."

In *KIOS v. Associated Press*, 299 U.S. 269; 81 L.Ed. 183, the opinion by Mr. Justice Roberts holds (p. 188):

“But where the allegations as to the amount in controversy are challenged by the defendant in an appropriate manner, *the plaintiff must support them by competent proof.*

* * * * *

“it did not assume the truth of the bill’s averments and assert that in spite of their truth the complaint failed to state a case within the court’s jurisdiction. On the contrary the motion traversed the truth of the allegations as to amount in controversy and in support of the denial recited facts dehors the complaint.”

The matter of Federal jurisdiction of both causes of action was challenged by Tepco at the hearing (R. 105, 113, 114) and on this appeal (R. 145, brief, p. 8). This placed the burden of proof squarely upon Wallace. That neither Wallace nor the Trial Court inquired into this matter is clear from the following (R. 133) :

“Mr. Miketta: * * * Is your Honor interested in the question of jurisdiction?

“The Court: No.”

There is no proof to support jurisdiction of a Federal Court in either of the two causes of action, and the complaint should have been dismissed on this ground alone. Such a failure is a clear abuse of discretion.

(7) Wallace’s assertion that the Tepco Opening Brief “is so confused and self contradictory that it falls flat and is of no help to either defendants or Your Honors” (Brief, p. 6) brings into focus that the Tepco brief was written and presented as a helpful document to this Court. So far as Wallace is concerned all Tepco can do is supply the ideas and the words to express them, not the intelligence to understand them.

CONCLUSION

Tepco urges the reversal of the Judgment and the dismissal of the complaint according to the rule of the *Mast, Foos Case*, in the interests of justice and to prevent the unnecessary expense and groundless litigation.

Dated at San Francisco, California, this 1st day of February, 1952.

Respectfully submitted,

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No. 13,094

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANTONE PAGLIERO and ARTHUR PAGLIERO, general partners doing business as Technical Porcelain & China-ware Co.,

Defendants-Appellants,

vs.

WALLACE CHINA Co., LTD., a corporation,

Plaintiff-Appellee.

PETITION FOR REHEARING.

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FILED

JUL 24 1952

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WALLACE CHINA Co., LTD., a corporation,

Plaintiff-Appellee.

PETITION FOR REHEARING.

Wallace China Co., Ltd., respectfully and earnestly petitions this Court for rehearing, pursuant to Rule 25 of this Court, on the point of unfair competition arising from the use of the Wallace patterns or ornamentations referred to in Section B of this Court's opinion filed July 1, 1952.

Appellants (Tepco) had appealed from the issuance of preliminary injunction restraining Tepco from copying four chinaware patterns originated by Wallace. Wallace has not had an opportunity of presenting evidence as yet.

The grounds upon which rehearing is requested are the following:

1. This Court's opinion states:

"On the other hand, where the feature or, more aptly, design, is a mere arbitrary embellishment, a form of dress for the goods primarily adopted for purposes of identification and individuality and, hence, unrelated to basic consumer demands in connection with the product, imitation may be forbidden where the requisite showing of secondary meaning is made."

"* * * one who copies them (*sic* Wallace patterns) can have no real purpose other than to trade on his competitor's reputation."

The above statements are believed to be true and Wallace respectfully requests that it be given full opportunity, at a trial on the merits, to show that the instant case comes within the rule stated hereinabove and entitling Wallace to relief. Rehearing is therefore respectfully requested and a modification of the opinion is urged so as to permit Wallace to have its day in court.

2. The Court's opinion is based upon a finding of fact, *i. e.*, that a design or ornamentation on a piece of china is functional. This Court, by its opinion, has modified the preliminary injunction upon reaching a conclusion that the designs or patterns in question are functional. Whether ornamentation on a dish is "functional" (as this term is defined in the authorities) or is not functional has not been briefed or argued. Wallace has not had

an opportunity of presenting evidence on this point. Your Honors' opinion does not hold that the District Court abused its discretion; the opinion may prevent Wallace from presenting evidence on the question of functionality. during trial. It is proper for this Court to call attention to this question of functionality of an ornamentation, but it is believed that **such question should be determined upon trial on the merits, after evidence is taken and the point properly briefed and argued.** A rehearing is respectfully urged for the purpose of permitting Wallace to present its views as to the lack of functionality in the patterns. Callmann, an authority on unfair competition, states:

“Functional features are of a technical not an ornamental nature, * * *.” (Callmann, *Unfair Competition and Trade Marks*, Vol. 2, p. 1042; 1945 ed.)

Functional elements have been repeatedly defined as “elements of mechanical construction” which are necessary to permit “practical operation of the article.” Under this test, a handle on a cup is functional, but the ornamentation is not. Ornamentation is not necessary to the mechanical construction or proper functioning of a cup. The ornamentation identifies the source of the article.

3. The question before this Court affects the entire ceramic industry and is of great importance. It is a case of first impression in this Circuit, and your Honors' opinion will control all of the District Courts in this circuit. It is urged that Wallace be given an opportunity

to discuss the question before this Court so that the Court be fully advised.

4. It is further urged that the opinion requires clarification because it is based upon a conclusion as to functionality of a pattern or ornamentation and the two cases from which such conclusion has been derived by this Court have been characterized by Callmann (Unfair Competition and Trademarks, cited in the opinion) as “* * * contrary to the weight of authority * * *.” (Callmann Note 4, Sec. 77.4(e)(3), p. 1041.)

It is doubted whether your Honors, by the opinion in this case, want to overrule the rule expressed in *Brooks v. Great Atlantic & Pacific Tea Co.*, 92 F. 2d 794 (C. A. 9). There your Honors found unfair competition and stated that

“* * * the test is, when such goods are not placed side by side, would an ordinarily prudent purchaser be liable to purchase the one, believing that he was purchasing the other.” (Quoting *McDonald v. Mueller* 183 Fed. 972, 974, and also quoting from *Chesebrough Manufacturing Co. v. Old Gold Chemical Co., Inc.*, 70 F. 2d 383, 385.)

Here, the record shows that purchasers were deceived [R. 36 and 49]. They were deceived by the defendants' appropriation of plaintiff's property.

“The command ‘THOU SHALT NOT STEAL!’ is as much a portion of the law of the courts of equity as it is of courts of law.”

Gines v. Cooper & Co., 14 Ch. Div. 596.

Stealing should not be condoned under the guise of free competition.

5. It is submitted that in this case there exists not only copying, but **copying coupled with dishonest conduct** and overreaching by defendants, and therefore the case is squarely within the rule of *International News Service v. Associated Press*, 248 U. S. 215. The cases referred to in *Cheney Brothers v. Doris Silk Corporation*, 35 F. 2d 279 at 280, included dishonest acts not present in the *Cheney* case and for that reason distinguished from *Cheney*.

Moreover, it appears that your Honors have overlooked paragraph 9 of the complaint in this case [R. 6-7]. Defendants did more than copy the Wallace patterns; paragraph 9 of the complaint charges defendants with a premeditated, willful and dishonest course of conduct, wherein (1) defendants conspired with an engraver (employed by Wallace) to have such engraver make rollers from which the copies are printed, and (2) defendants then made and sold copies under Wallace trademarks.

Defendants' complete course of conduct, the combined effect of defendants' acts, should be considered.

DISCUSSION.

It is respectfully urged that a rehearing be granted in the instant case because of its great importance. This is the first case in which an Appellate Court has been asked to determine whether the copying of an ornamentation on chinaware, **coupled with** an appropriation of trade-marks, constitutes unfair competition. The District Court had granted a preliminary injunction restraining Tepco from using the trade names and from using the specific patterns. The injunction has been stayed pending appeal and therefore defendants are not prejudiced by the additional time which will be consumed in rehearing this case.

Because of its primary character, this case is of great importance not only to Wallace China Co., Ltd., but to all manufacturers of chinaware. The decision of this Court will control the actions of the District Courts.

Unfortunately, although this Court's opinion is based upon the conclusion that the ornamentation given a dish is functional, neither of the parties have heretofore contended that the patterns were functional, and this question has not been briefed or argued.

A restaurant purchases dishes because there is a primary need for dishes, for plates, for cups and saucers. The purpose or use of the dishes as receptacles or containers for food and drink is paramount.

The decoration or ornamentation on a dish does not “* * * promote efficiency for the purpose to which it is devoted.” (*Marvel & Co. v. Pearl*, 133 Fed. 160, C. C. A. 2). Such decoration is not functional. As long as a cup has a functional handle it performs the purpose for which it is bought irrespective of the ornamentation which may be applied to its outer surface.

It is urged that the ornamentation or pattern carried by a cup or a plate is decorative embellishment. The Shadow Leaf pattern may appeal to some and the Tweed pattern may appeal to others. A restaurant owner may purchase the Tweed pattern because it conforms to the color scheme and decor of his restaurant whereas another restaurant keeper may prefer the Shadow Leaf pattern because of the semi-tropical decor of his restaurant. In both instances, however, dishes are bought because there is a need for dishes, cups and saucers as containers for food.

It is urged that to hold the ornamentation on a cup or saucer to be functional would be for this Court to judicially hold that a person purchases dishes not because he needs dishes for the purpose of serving food thereon, but because the particular pattern on the dish performs some unknown function upon the purchaser's ego or aesthetic sense.

It is therefore urged that this case be set for rehearing and Wallace be given an opportunity of discussing the question of functionality, it being sincerely urged and contended by Wallace that the ornamentation on a dish is not functional, that the instant case differs in fact from the cases referred to in this Court's opinion and that the opinion should be modified to let the preliminary injunction stand, whereby the District Court can try the case on the merits, during which the parties will have full opportunity to present evidence and defend on the questions of secondary meaning and functionality.

Dated this 24th day of July, 1952.

C. A. MIKETTA,

Attorney for Plaintiff-Appellee.

Certificate of Counsel.

It is hereby certified that the above petition for rehearing and modification is made in good faith, is well founded and is not interposed for purposes of delay.

C. A. MIKETTA,
Attorney for Wallace China Co., Ltd.

No. 13096

United States
Court of Appeals
for the Ninth Circuit.

EUGENE S. SMITH & CO., INC., a Corporation,
Appellant,
vs.

ELOY GIN CORPORATION, a Corporation, and
HOME INSURANCE COMPANY, a Corporation,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona.

FILED

NOV 30 1951

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Home Insurance Company.

In the United States District Court
for the District of Arizona

No. Civil 1135

EUGENE B. SMITH & CO., INC.,

Plaintiff,

vs.

ELOY GIN CORPORATION and HOME
INSURANCE COMPANY,

Defendants.

MOTION TO DISMISS AND SEPARATE
ANSWER OF THE HOME INSURANCE
COMPANY

Comes Now the Home Insurance Company, by its attorneys, Theodore G. McKesson and Robert H. Renaud, and in appearance to the plaintiff's amended complaint, moves the Court for an order dismissing plaintiff's amended complaint for damages by reason of fire loss, on the grounds and for the reasons that said amended complaint is based upon a claim upon a contract of fire insurance against The Home Insurance Company and is barred by the statutes of limitations. That the plaintiff's amended complaint fails to state a claim against this defendant upon which relief may be granted.

Wherefore, the defendant prays that said amended complaint be dismissed, that it recover

judgment against the plaintiff, together with its costs herein incurred.

THEODORE G. McKESSON,

ROBERT H. RENAUD,

By /s/ THEODORE G. McKESSON,
Attorneys for the Defendant,
The Home Insurance
Company.

Separate Answer of The Home
Insurance Company

In the event the foregoing Motion to Dismiss is denied, but without waiving same, in further appearance to plaintiff's amended complaint, this defendant admits, denies and alleges:

Not being advised of the corporate status of or of the assignment of said claim by Eugene B. Smith, an individual, to Eugene B. Smith & Co., denies same upon information and belief and requires strict proof thereof. Defendant admits that Eloy Gin Corporation is an Arizona corporation, and admits that this defendant is a New York corporation. Admits that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

I.

This defendant is not advised as to whether or not Eugene B. Smith, dba Eugene B. Smith & Co. was the owner of 40 bales of cotton evidenced by warehouse receipts on and prior to the 25th day of

January, 1946, and therefore denies same upon information and belief and requires strict proof thereof. Admits all other allegations of paragraph I.

II.

In answer to paragraph II of said amended complaint, this defendant admits that it had, prior to January 25, 1946, a policy of fire insurance, No. 6857, insuring Eloy Gin Corporation against loss by fire, but denies that said policy of fire insurance was for the benefit of Eugene B. Smith, dba Eugene B. Smith & Co., or others having cotton in the possession of the defendant Eloy Gin Corporation holding receipt therefor, and alleges that said policy, among other things, provides:

“This policy insures Eloy Gin Corporation.

Loss, if any, to be adjusted with the Insured named herein and payable to Insured . . .”

This defendant denies that it has any liability whatsoever to Eugene B. Smith, dba Eugene B. Smith & Co.

III.

In answer to paragraph III of said amended complaint, this defendant admits that on or about January 25, 1946, a fire occurred in the premises of Eloy Gin Corporation and destroyed 39 bales of the said 40 bales of cotton. Denies that said bales of cotton had an actual cash value at the date of said loss of \$4,736.85, and in that regard alleges that the reasonable cash market value of said cotton at said time was \$4,028.61.

IV.

In answer to paragraph IV of said amended complaint, this defendant admits that at the time of said loss and damage by fire to said 39 bales of cotton, that same were in the physical possession of Eloy Gin Corporation under warehouse receipts. Denies that said 39 bales of cotton were protected by insurance of this defendant, and in that regard alleges that only Eloy Gin Corporation was protected by insurance for fire, and that they had made a separate contract with the assignee of plaintiff, whereby Eugene B. Smith, dba Eugene B. Smith & Co. had assumed all damage and loss by fire of said 39 bales of cotton, when it paid the drafts for said cotton with the gin receipts attached.

V.

In answer to paragraph V of said amended complaint, this defendant denies that as a result of said fire and damage to the 39 bales of cotton Eloy Gin Corporation became liable to Eugene B. Smith, dba Eugene B. Smith & Co. for the destruction of said cotton by fire. Denies that the Home Insurance Company by virtue of its policy of fire insurance issued to the defendant Eloy Gin Corporation became liable for damage to the 39 bales of cotton, and denies that the defendant's policy of insurance inured to the benefit of Eugene B. Smith, dba Eugene B. Smith & Co.

VI.

In answer to paragraph VI, this defendant denies that Eugene B. Smith, dba Eugene B. Smith

& Co. duly made a claim against Eloy Gin Corporation for the amount of said loss and damage, and in that regard alleges that the National Fire Insurance Company through the Cotton Insurance Association made a demand upon Eloy Gin Corporation for such loss by fire, as it had paid Eugene B. Smith, dba Eugene B. Smith & Co. for the loss of said cotton under its policy of marine insurance, as the said Eugene B. Smith was the owner of said cotton at the time of said fire, and the risk by fire of said 39 bales of cotton was assumed by the said Eugene B. Smith, dba Eugene B. Smith & Co. upon his paying the drafts for said cotton, evidenced by gin receipts, which had been done prior to January 25, 1946. This defendant denies that Eloy Gin Corporation filed a proof of loss with this defendant for said loss. Admits that this defendant has refused to pay Eugene B. Smith & Co. and/or its insurance carrier, National Fire Insurance Company, through the Cotton Insurance Association.

VII.

Not being advised of the truth or falsity of the allegations of paragraph VII, this defendant denies same upon information and belief and requires strict proof thereof.

VIII.

Further answering plaintiff's amended complaint, this defendant alleges that same fails to state a claim against this defendant upon which relief may be granted, and alleges that more than one year

has expired since said loss, and that if the plaintiff had a cause of action against this defendant its right to bring such an action expired within twelve months after January 25, 1946, and that this action was not brought for almost two years after January 25, 1946.

IX.

Further answering said amended complaint and in complete bar thereof, this defendant alleges that in November, 1945, the plaintiff's assignee executed two purchase orders for a 1,000 bale lot and a 300 bale lot of cotton from Eloy Gin Corporation, which was confirmed in writing, which provided, among other things, the grade, staple, price, weights and delivery of not less than 100 bale lots as fast as ginned and grades obtained. That said agreements among other things provided as follows: that the insurance on the cotton so purchased in the said contracts should be at "sellers' risk until payment completed"; that said contracts further provided that the seller, Eloy Gin Corporation, was to be paid on sight draft with gin yard receipts attached, together with grade receipts, through the Valley National Bank at Phoenix, Arizona.

That said written sale and purchase contracts were fully carried out prior to January 25, 1946, the date of the fire alleged in plaintiff's amended complaint; that the 39 bales of cotton alleged to have been destroyed in plaintiff's amended complaint, upon which it alleges it held gin receipts, were paid for more than a month before the date of said fire by draft drawn by Eloy Gin Corpora-

tion upon the plaintiff's assignee through The Valley National Bank, and that in accordance with said contracts the payment of all of said 1300 bales of cotton had been completed on or before the date of said fire, and that therefore all risk on said cotton was thereafter upon the buyer, assignee of plaintiff herein by special contract; that, therefore, Eloy Gin Corporation by special contract relieved itself of any liability to Eugene B. Smith, dba Eugene B. Smith & Co., and any loss sustained by said fire was by special agreement assumed by the plaintiff's assignee.

X.

Further answering said amended complaint, this defendant alleges that prior to January 25, 1946, Eugene B. Smith, dba Eugene B. Smith & Co., plaintiff's assignor, had insured all of its cotton that it had title to and had paid for, together with the cotton alleged to have been destroyed by fire in defendant Eloy Gin Corporation's gin yard, with the National Fire Insurance Company through the Cotton Insurance Association, a marine insurance carrier, which insured the plaintiff's assignee for loss by fire or other destruction on all cotton to which it had title, and this defendant is informed and believes and therefore alleges that the said Eugene B. Smith, dba Eugene B. Smith & Co., assignor of the plaintiff herein, was paid for the loss of said cotton by the National Fire Insurance Company through the Cotton Insurance Association for the 39 bales of cotton destroyed on or about January 25, 1946, in the gin yard of Eloy Gin

Corporation. That by virtue of the contract by the plaintiff and the defendant Eloy Gin Corporation, the plaintiff assumed all risk of insurance and loss of said cotton after the plaintiff had paid for said cotton in accordance therewith, and the defendant Eloy Gin Corporation became and was relieved of any responsibility for the loss of said cotton; and this defendant further alleges that the plaintiff is not the real party in interest in this action, and that neither it nor the insurance carrier, National Fire Insurance Company through the Cotton Insurance Association, are entitled to recover from the Home Insurance Company or from Eloy Gin Corporation.

XI.

Further answering said amended complaint, this defendant alleges that this defendant at the time of said fire on or about January 25, 1946, under its policy of insurance No. 6857 only insured Eloy Gin Corporation and not the plaintiff or its assignor or any other person or persons that had cotton stored in the said gin yard, evidenced or not evidenced by warehouse receipts, and in that regard this defendant alleges that its said policy provided as follows:

“This policy insures Eloy Gin Corporation. Loss, if any, to be adjusted with the Insured named herein and payable to Insured . . .”

XII.

Further answering said amended complaint, this defendant alleges that Eloy Gin Corporation made no claim under its proof of loss for the 39 bales

of cotton mentioned and no sums were paid Eloy Gin Corporation for said 39 bales of cotton. That more than sixty days have elapsed since the proof of loss filed with this defendant was made and paid, which did not include the 39 bales of cotton herein mentioned. That Eloy Gin Corporation did not bring an action against this defendant for any loss under the 39 bales of cotton mentioned within twelve months from the date of said loss, as provided in the New York Standard Form of insurance contract which was adopted as part of the laws of the State of Arizona, which said policy, among other things, provides:

“No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.”

That by reason of the facts herein alleged, this defendant is not liable under its said policy of insurance to the plaintiff or its assignor or to the Eloy Gin Corporation.

XIII.

Further answering said amended complaint, this defendant alleges that Eugene B. Smith, dba Eugene B. Smith & Co., had specific insurance with National Fire Insurance Company through the Cotton Insurance Association, and that the policy of this defendant, among other things, provides as follows:

“7. ‘Excess Clause.’ This policy does not

attach to or become insurance against any peril upon property herein described which at the time of any loss is insured by specific insurance as defined in paragraph 6, until the liability of such specific insurance has been exhausted, and then shall cover only such loss or damage as may exceed the amount due from such specific insurance (including the amount otherwise due from invalid insurance had same been valid, and including also the amount due from any uncollectible insurance) after application of any contribution, coinsurance, average, distribution, or other similar clauses contained in policies of such specific insurance affecting the amount due thereunder, not, however, exceeding limits as set forth herein."

XIV.

That if it be found that this defendant's insurance policy inures to the direct benefit of Eugene B. Smith, dba Eugene B. Smith & Co. as of January 25, 1946, and if it be found that Eloy Gin Corporation is responsible to Eugene B. Smith, dba Eugene B. Smith & Co. for the loss by fire of said 39 bales of cotton by reason of its warehouse receipts, and that if it further be found that this defendant's policy is effective for the benefit of Eugene B. Smith, dba Eugene B. Smith & Co., then by reason of the aforesaid clause of excess insurance and the specific insurance held by Eugene B. Smith, dba Eugene B. Smith & Co. with National Fire Insurance Company through the Cotton Insur-

ance Association, this defendant is not liable, and the plaintiff or its assignor, Eugene B. Smith, dba Eugene B. Smith & Co., or Cotton Insurance Association, or the National Fire Insurance Company, are not entitled to recover from Home Insurance Company or Eloy Gin Corporation.

XV.

Further answering plaintiff's amended complaint, this defendant alleges that if it be held that the plaintiff or its assignor is entitled to recover against this defendant notwithstanding the allegations herein set forth, it is alleged that it is not entitled to recover on the grounds that this defendant's policy contained a contributing insurance clause reading as follows:

"5. 'Contributing Insurance Clause.' Permission is granted for other insurance written upon the same plan, terms, conditions, and provisions as those contained in the form attached to this policy, i.e., Insurance written under this provisional reporting form. The insurance under this policy is in accordance with its printed conditions or riders, shall contribute only with other insurance as herein above defined, against any peril insured by this policy."

and that by reason thereof, if this defendant be found liable to Eloy Gin Corporation, then it is only liable under its contributing insurance clause, the exact amount of which is unknown, as this defendant is not advised of the amount or limitations of the policy held by Eugene B. Smith, dba

Eugene B. Smith & Co., issued by National Fire Insurance Company through the Cotton Insurance Association. That said policy of insurance of this defendant further provides:

“This company shall not be liable for a greater portion of any loss or damage than the amount hereby insured shall bear to the whole insurance covering the property, whether valid or not, and whether collectible or not.”

XVI.

That by reason of the matters herein stated, including the allegations pertaining to the assumption of risk and that the plaintiff is not the real party in interest, the plaintiff is not entitled to recover on its complaint against Home Insurance Company or Eloy Gin Corporation or either of them.

Wherefore, this defendant prays that the plaintiff take nothing by its amended complaint, and that this defendant recover judgment against the plaintiff, together with its costs herein incurred.

THEODORE G. McKESSON,

ROBERT H. RENAUD,

By /s/ THEODORE G. McKESSON,
Attorneys for the Defendant,
The Home Insurance
Company.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 28, 1950.

[Title of District Court and Cause.]

SEPARATE ANSWER OF
ELOY GIN CORPORATION

Comes Now the defendant Eloy Gin Corporation, by its attorneys, Theodore G. McKesson and Robert H. Renaud, and in answer to plaintiff's amended complaint admits, denies and alleges:

This defendant is not advised of the corporate status of or of the assignment of said claim by Eugene B. Smith, an individual, to Eugene B. Smith & Co., and therefore denies same upon information and belief and requires strict proof thereof. Defendant admits that Eloy Gin Corporation is an Arizona corporation, and admits that the Home Insurance Company is a New York corporation. Admits that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

I.

Admits paragraph I of said amended complaint in all respects except insofar as it was alleged that Eugene B. Smith, dba Eugene B. Smith & Co. was the legal owner of 40 bales of cotton on January 25, 1946, and therefore denies same on information and belief and requires strict proof thereof.

II.

Admits that prior to January 25, 1946, this defendant obtained from the defendant Home Insurance Company a policy of fire insurance on cotton in its gin yard, but denies that said policy of fire

insurance insured this defendant for the benefit of Eugene B. Smith & Co. and others having cotton in the possession of this defendant and holding its receipts therefor against loss and damage by fire and other hazards, and in that regard this defendant alleges that the insuring agreement of the said Home Insurance Company in said policy of fire insurance, among other things, provided:

“Loss, if any, to be adjusted with the Insured named herein and payable to Insured on merchandise of every description (except as hereinafter excluded) consisting principally of cotton by-products, materials and supplies...”

That said policy of fire insurance provided that any losses must be adjusted with Eloy Gin Corporation and payable to Eloy Gin Corporation and not to other persons or corporations.

III.

In answer to paragraph III of said amended complaint, this defendant admits that on or about January 25, 1946, a fire occurred in the premises of this defendant where said bales of cotton were stored and destroyed 39 bales of the said 40 bales of cotton. Denies that said bales of cotton had an actual cash value at the date of said loss of \$4,736.85, and in that regard alleges that the reasonable cash market value of said cotton at said time was \$4,028.61.

IV.

In answer to paragraph IV this defendant admits that at the time of said loss by fire the said

39 bales of cotton were in the possession of this defendant under the warehouse receipts above described. Denies that the same were protected by the insurance policy of the Home Insurance Company.

V.

Denies the allegations of paragraph V thereof.

VI.

In answer to paragraph VI, this defendant admits that after the time of said loss by fire Eugene B. Smith dba Eugene B. Smith & Co. made a claim against this defendant through the insurance carrier of Eugene B. Smith & Co. for the amount of said loss and damage to the 39 bales of cotton. Admits that Eloy Gin Corporation denied liability and refused to pay said loss. Denies that the plaintiff or its assignee made proof of loss with the Home Insurance Company for said loss of cotton by fire, and in that regard alleges that Eugene B. Smith & Co. could only make a claim for said loss by fire against Eloy Gin Corporation.

VII.

In answer to paragraph VII, this defendant is not advised of the truth or falsity of the allegations thereof and therefore denies same upon information and belief and requires strict proof thereof.

VIII.

Further answering said amended complaint this defendant alleges that the plaintiff or its assignee Eugene B. Smith & Co. are not the real parties in

interest in said litigation, in that Eugene B. Smith dba Eugene B. Smith & Co. held a policy of marine fire insurance which was in full force and effect, being policy No. OC-58587 of the National Fire Insurance Company, which was in full force and effect at the time of said fire on the premises of this defendant. That pursuant to said policy of fire insurance the said company paid the assignee of plaintiff herein the full amount of said loss by fire through the Cotton Insurance Association and became subrogated to the rights which Eugene B. Smith might have against this defendant.

IX.

Further answering said amended complaint, this defendant alleges that same fails to state a claim against this defendant upon which relief may be granted.

X.

Further answering said amended complaint, this defendant alleges that on or about the 7th day of November, 1945, Eloy Gin Corporation as seller and Eugene B. Smith & Co. as buyer entered into two separate written contracts for the purchase and sale of cotton, the first contract being No. P-200, dated November 7, 1945, covering 300 bales of cotton, and the second contract, No. P-201, covering 1,000 bales of cotton; that said contracts were identical with the exception that one covered 300 bales of cotton and the other 1,000 bales of cotton. That among other things each of said written contracts provided in substance that the seller sold and

the buyer bought the respective bales of cotton for certain prices on the terms and conditions set forth, and provided as follows:

“Insurance at sellers risk until payment completed.

“Reimbursement Sight Draft, gin-yard receipts attached, also Smith/Doxey cards, Draw on Eugene B. Smith & Co., care Valley National Bank, Phoenix.”

XI.

Further answering said amended complaint, this defendant alleges that each of said contracts for the purchase and sale of cotton was completed in full in accordance with its terms. As cotton was ginned and baled, the bales were marked and gin yard receipts issued for each bale. Sight drafts were drawn on Eugene B. Smith & Company in care of The Valley National Bank, Phoenix, with gin yard receipts attached thereto, and when the drafts were paid the gin yard receipts were delivered by The Valley National Bank, Phoenix, to Eugene B. Smith & Co. The bales of cotton remained in the possession of Eloy Gin Corporation until removed from its possession by surrender of gin yard receipts and delivery of the cotton to the one presenting the receipts. All of said cotton was paid for in accordance with the terms of said agreements and all delivered, and the gin yard receipts were surrendered with the exception of 39 gin yard receipts, prior to January 25, 1946.

XII.

Further answering said amended complaint, this defendant alleges that the 39 bales of cotton alleged to have been destroyed by fire and upon which it alleges it held gin receipts, were paid for more than a month before the date of said fire by draft drawn by the defendant Eloy Gin Corporation upon the plaintiff through The Valley National Bank, and that in accordance with said contracts the payment of all of said 1300 bales of cotton had been completed on or before the date of said fire, and that therefore all risk on said cotton was thereafter upon the buyer, assignee of the plaintiff herein, by special contract. That the plaintiff herein and its assignee by special contract with this defendant relieved this defendant of any and all liability to plaintiff and its assignee for any loss sustained by said fire and that same was assumed by Eugene B. Smith & Co., assignee of plaintiff.

XIII.

Further answering said amended complaint, this defendant alleges that it made no proof of loss or claim against the Home Insurance Company by reason of the destruction of the 39 bales of cotton on which the plaintiff's assignee was alleged to have gin receipts, for the reason that this defendant had contracted with plaintiff's assignee that upon payment of the bale receipts through The Valley National Bank, the plaintiff's assignee assumed all liability for the destruction of said cotton by fire. That more than sixty days has elapsed since said

fire, within which this defendant could file a claim under its policy with the Home Insurance Company, and more than one year has elapsed since said fire, and therefore any claims of this defendant against the Home Insurance Company are barred by the statute of limitations, and that if the said Home Insurance Company were liable to Eloy Gin Corporation or to the plaintiff that any cause of action by the plaintiff or its assignee against the Home Insurance Company is barred by the statute of limitations, as the New York Standard Form of Fire Insurance adopted by the Legislature of the State of Arizona, among other things, provides:

“No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.”

Wherefore, this defendant prays that the plaintiff take nothing by its said amended complaint, that this defendant recover judgment against the plaintiff, and for its costs herein incurred.

THEODORE G. McKESSON,

ROBERT H. RENAUD,

By /s/ THEODORE G. McKESSON,

Attorneys for the Answering
Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 28, 1950.

In the United States District Court
For the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District
Judge, Presiding.

MINUTE ENTRY OF
MONDAY, OCTOBER 23, 1950

On motion of Joseph S. Jenckes, Jr., counsel for defendant, Eloy Gin Corporation, over objections of Theodore G. McKesson, counsel for defendant, Home Insurance Company and his statement counsel for plaintiff has no objection,

It Is Ordered that the defendant Eloy Gin Corporation be allowed to file Motion to Dismiss, Amended Answer and Cross-Claim herein.

In the United States District Court
For the District of Arizona

No. Civ. 1135

EUGENE B. SMITH & CO., INC.,

Plaintiff,

vs.

ELOY GIN CORPORATION and HOME IN-
SURANCE COMPANY,

Defendants.

ELOY GIN CORPORATION,

Cross-Claimant,

vs.

HOME INSURANCE COMPANY,

Cross-Defendant.

MOTION TO DISMISS, AMENDED ANSWER
AND CROSS-CLAIM OF ELOY GIN COR-
PORATION

Motion to Dismiss

Comes Now, defendant Eloy Gin Corporation and moves to dismiss the amended complaint of the plaintiff for the reasons that the court lacks jurisdiction over the subject matter and the complaint fails to state claim upon which relief can be granted against this defendant.

Answer

Without waiving the foregoing motion to dismiss, and only in the event that the same is denied,

defendant Eloy Gin Corporation for its answer to plaintiff's amended complaint admits, denies and alleges as follows:

First Defense

Alleges that the amended complaint fails to state a claim upon which relief can be granted.

Second Defense

I.

Admits that this defendant is an Arizona corporation, that defendant Home Insurance Company is a New York corporation, that plaintiff is a Texas corporation, and that the matter in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars (\$3,000.00). Admits the allegations of paragraphs I and II.

II.

Admits the allegations of paragraph III except the allegations that the actual cash market value of said cotton was Four Thousand Seven Hundred Thirty-Six and 85/100 (\$4,736.85) Dollars, which allegation defendant denies and in this respect defendant alleges that the reasonable market value of said cotton at said time was Four Thousand Twenty-Eight and 61/100 (\$4,028.61) Dollars.

III.

Answering paragraph IV, defendant admits that at the time said cotton was destroyed by fire it was in the possession of this defendant and was pro-

tected by the insurance of the Home Insurance Company to the extent provided in said policy of insurance.

IV.

Answering paragraph V, defendant denies that as a result of said loss and damage by fire this defendant became liable to Eugene B. Smith dba Eugene B. Smith and Company in any amounts whatsoever and in this respect defendant alleges that prior to the destruction of said cotton as aforesaid the same had been purchased by the said Eugene B. Smith dba Eugene B. Smith and Company from this defendant; that the purchase price thereof had been paid and title thereto had passed to the said Eugene B. Smith; that said cotton was at such time in the possession of defendant as a gratuitous bailee and that all risk of loss or damage thereto by fire or other casualty had been assumed by the said Eugene B. Smith.

V.

Admits the allegations of paragraph VI.

VI.

Answering paragraph VII, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments therein contained.

Third Defense

Defendant alleges that at the time of the destruction of aforesaid cotton by fire the plaintiff had

secured and there was in force and effect a policy of marine fire insurance issued by National Fire Insurance Company, and pursuant to said policy of fire insurance said company paid to the said Eugene B. Smith the full amount of the loss sustained by the said Eugene B. Smith as a result of said fire; that by reason thereof plaintiff, or its predecessor in interest, sustained no loss or damage as a result of said fire and is not the real party in interest herein.

Fourth Defense

Defendant alleges that prior to said fire the cotton referred to in plaintiff's complaint was purchased by the said Eugene B. Smith dba Eugene B. Smith and Company from defendant; that the purchase price thereof had been paid and title thereto had passed to the said Eugene B. Smith; that at the time of said fire said cotton was in the possession of defendant as a gratuitous bailee; that at the time of said fire defendant was with respect to its possession of said cotton exercising that degree of care which was imposed upon it by law in its capacity as a gratuitous bailee.

Fifth Defense

Defendant alleges that at the time of said fire defendant was with respect to its possession of said cotton exercising that degree of care that a reasonably careful owner of similar goods would exercise.

Cross-Claim

Comes Now defendant and cross-claimant, Eloy Gin Corporation, and for its cross-claim against Home Insurance Company, defendant and cross-defendant alleges:

I.

Cross-claimant is an Arizona corporation; cross-defendant is a New York corporation.

II.

On or about the 25th day of January, 1946, cross-claimant was in possession of thirty-nine (39) bales of cotton belonging to Eugene B. Smith dba Eugene B. Smith and Company, which were on or about said date destroyed by fire. Prior to January 25th, 1946, cross-claimant had secured from cross-defendant, and there was in force and effect at the time of the destruction of said cotton by fire, a policy of fire insurance which provided among other things that cross-defendant would pay to cross-claimant the amount of the loss or damage which might be sustained by the owners of any cotton in the possession of cross-claimant and for which loss cross-claimant might be liable; by reason thereof cross-defendant is liable to cross-claimant for any and all sums which may be determined to be due from cross-claimant to plaintiff herein.

Wherefore, defendant and cross-claimant prays:

1. That plaintiff take nothing by its complaint and that this defendant have and recover of and

from plaintiff its costs of suit incurred and expended herein;

2. That in the event judgment is rendered herein in favor of plaintiff and against defendant and cross-claimant, judgment in like amount be rendered in favor of cross-claimant and against cross-defendant, together with cross-claimant's costs and a reasonable attorneys' fee;

3. That defendant and cross-claimant have such other and further relief as the court may deem proper.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ JOS. S. JENCKES, JR.,
Attorneys for Defendant and Cross-Claimant, Eloy
Gin Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed October 23, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS AND PLEA IN BAR
AND ANSWER OF CROSS-DEFENDANT
TO CROSS-CLAIM

MOTION TO DISMISS AND PLEA IN BAR

Comes Now the cross-defendant Home Insurance Company, by its attorneys, Theodore G. McKesson and Robert H. Renaud, and in appearance to the

cross-claim of Eloy Gin Corporation filed on or about October 23, 1950, moves the Court:

For an order dismissing said cross-claim upon the grounds and for the reasons:

(1) That the same fails to state a claim upon which relief may be granted against the cross-defendant.

(2) That the cross-claim is based upon a contract of insurance with the cross-defendant Home Insurance Company on the New York standard form, and the loss is alleged to have occurred on January 25, 1946, and no action was filed against the cross-defendant until on or about October 23, 1950, and it is therefore barred by the statute of limitations.

(3) That it is not shown that the Eloy Gin Corporation ever filed a proof of loss for said alleged destruction by fire of the 39 bales of cotton within the time provided by said policy of insurance, and therefore any claims on said policy are barred.

Wherefore, cross-defendant prays that said cross-claim be dismissed, that it recover judgment against Eloy Gin Corporation and for costs herein incurred.

THEODORE G. McKESSON,

ROBERT H. RENAUD,

By /s/ THEODORE G. McKESSON,
Attorneys for the Cross-Defendant Home Insurance
Company.

Answer

In the event the foregoing motion to dismiss and plea in bar are denied or overruled, but without waiving same, in further appearance to Eloy Gin Corporation's cross-claim against Home Insurance Company, cross-defendant admits, denies and alleges as follows:

I.

In answer to paragraph I thereof, cross-defendant admits that Eloy Gin Corporation is an Arizona corporation, and admits that Home Insurance Company is a New York corporation authorized to do business in the State of Arizona.

II.

In answer to paragraph II, not being advised of the truth or falsity of the allegation that 39 bales of cotton belonging to Eugene B. Smith & Company were destroyed by fire on January 25, 1946, at the Eloy Gin Corporation gin yard, cross-defendant therefore denies same upon information and belief and requires strict proof thereof. Admits that on and prior to the 25th day of January, 1946, there was in full force and effect at the time of a fire occurring at the Eloy Gin Corporation gin yard on said date a policy of fire insurance on the New York standard form insuring Eloy Gin Corporation as follows:

“On merchandise of every description * * * consisting principally of cotton by-products, materials and supplies manufactured or in

process of manufacture, and on materials for manufacturing same, including packages, labels, cases, boxes and all wrapping and packing materials, all being the property of insured or sold but not delivered or removed; and (Provided the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor), this insurance shall also cover merchandise held in trust, or on commission or consignment, or left for storage or repairs, but loss thereon shall be adjusted with and payable to the insured named in this policy; * * *

III.

Further answering said cross-claim, cross-defendant denies each and every allegation not herein expressly admitted, and alleges that same fails to state a claim against the cross-defendant upon which relief may be granted.

IV.

Further answering said cross-claim, cross-defendant alleges, in complete bar of any relief in behalf of Eloy Gin Corporation, as follows: That Home Insurance Company is informed and believes that the alleged 39 bales of cotton located in the Eloy Gin Corporation's gin yard had, by special agreement between Eloy Gin Corporation and Eugene B. Smith & Company been sold to Eugene B. Smith & Company, and that said 39 bales of cotton had been paid for in accordance with said agreement, and that the risk of loss by fire to said cotton was

assumed by Eugene B. Smith & Company upon the payment of the drafts covering said 39 bales of cotton, and that pursuant to said agreement Eugene B. Smith & Company had marine insurance under a policy with National Fire Insurance Company protecting them from any and all loss they might incur by reason of the destruction of any cotton they might legally have title to.

V.

Further answering said cross-claim, cross-defendant alleges that Eugene B. Smith & Company collected the full loss under its policy of marine insurance from the National Fire Insurance Company for the destruction of said 39 bales of cotton.

VI.

Further answering said cross-claim, cross-defendant alleges that Eloy Gin Corporation at no time ever filed a proof of loss with Home Insurance Company, within sixty days as provided in said policy of insurance, or at any other time, for the payment of the alleged loss of the 39 bales of cotton, and in that regard alleges that said policy of insurance provides, among other things, as follows:

“ . . . and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss, signed and sworn to by the insured . . . ”

That no proof of loss was ever filed and no extension in writing ever given by Home Insurance Company.

VII.

Further answering said cross-claim, cross-defendant alleges that its policy of insurance further provides:

“No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.”

That no action was ever taken by Eloy Gin Corporation against Home Insurance Company until the 23rd day of October, 1950, and that Eloy Gin Corporation has never filed a proof of loss and has not complied with the terms of the policy, and any action on this cross-claim is barred, first, on the ground that no proof of loss was ever filed and the policy provisions were not complied with, and, second, action was not commenced within twelve months next after inception of the loss.

Wherefore, the cross-defendant prays that Eloy Gin Corporation take nothing by its cross-claim, and that it have judgment against Eloy Gin Corporation, together with costs incurred.

THEODORE G. McKESSON,

ROBERT H. RENAUD,

By /s/ THEODORE G. McKESSON,
Attorneys for the Cross-Defendant, Home Insurance
Company.

Notice

To Eugene B. Smith & Co., Inc., Plaintiff, and to their attorneys, Fennemore, Craig, Allen & Bledsoe, and to Eloy Gin Corporation, Cross-Claimant, and to their attorneys, Evans, Hull, Kitchel & Jenckes:

You will please take notice that the cross-defendant Home Insurance Company will, on the 27th day of October, 1950, at the hour of 10:00 o'clock a.m., urge the foregoing Motion to Dismiss and Plea in Bar.

Dated this 24th day of October, 1950.

THEODORE G. McKESSON,

ROBERT H. RENAUD,

By /s/ THEODORE G. McKESSON,
Attorneys for the Cross-Defendant Home Insurance
Company.

Receipt of copy acknowledged.

[Endorsed]: Filed October 25, 1950.

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT FOR
DAMAGES BY REASON OF FIRE LOSS

First Cause of Action

Plaintiff is a corporation organized and existing under the laws of the State of Texas. The defendant,

Eloy Gin Corporation, is a corporation organized and existing under the laws of the State of Arizona. The defendant, Home Insurance Company, is a corporation organized and existing under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

I.

On and prior to January 25, 1946, Eugene B. Smith doing business as Eugene B. Smith & Co. was the legal owner of forty (40) bales of cotton which were in the possession of the defendant, Eloy Gin Corporation, at its place of business at Eloy, Arizona, and at such time Eugene B. Smith dba. Eugene B. Smith & Co. held and owned for each of said 40 bales of cotton a receipt issued by the defendant, Eloy Gin Corporation, and acknowledging receipt of one bale of cotton stored in said defendant's gin yard. Each of said receipts contained the weight of the respective bale of cotton, the date of the issuance of the receipt, the name of the person to whom the receipt was issued and for whose account said receipt was issued, and contained, among others, the following provisions:

“That said bale of cotton has been insured while stored as aforesaid under this receipt against direct loss and/or damage by fire except as limited and provided in insurance policy covering the same.

“This company will deliver said cotton in said yard to said depositor or order upon surrender of this original receipt, properly endorsed, and the payment of all charges against said cotton.”

Each of said receipts was duly endorsed and delivered to Eugene B. Smith dba. Eugene B. Smith & Co. by defendant, Eloy Gin Corporation.

II.

That defendant, Eloy Gin Corporation, failed to insure any of the said bales of cotton against direct loss or damage by fire, although said defendant did have a policy of insurance with Home Insurance Company which, by its terms, excluded the bales of cotton herein involved.

III.

That on or about January 25, 1946, a fire occurred at the premises of the Eloy Gin Corporation, where said bales of cotton were stored, which damaged and destroyed 39 of said 40 bales of cotton, and at the time of said total destruction of said bales of cotton they had the actual cash market value, at the time and place of said fire, of \$4,736.85.

IV.

At the time of said loss and damage by fire to said bales of cotton, they were in the possession of defendant, Eloy Gin Corporation, under said receipts above described.

V.

As a result of said loss and damage by fire the defendant, Eloy Gin Corporation, became liable to Eugene B. Smith dba. Eugene B. Smith & Co. in the amount of said damage, with interest at the legal rate from the date of said fire.

VI.

After said fire occurred Eugene B. Smith, dba. Eugene B. Smith & Co., duly made claim against the Eloy Gin Corporation for the amount of said loss and damage, and defendant Eloy Gin Corporation denied liability upon said claim and has refused to pay the loss and damage, or any part thereof.

VII.

That thereafter and on the 1st day of July, 1946, plaintiff was formed as a corporation under the laws of the State of Texas, and thereafter duly qualified to do business as a foreign corporation within the State of Arizona; that plaintiff upon its incorporation acquired all of the assets of Eugene B. Smith dba. Eugene B. Smith & Co., including the cause of action sought to be enforced herein and assumed all of the liabilities and obligations of Eugene B. Smith dba. Eugene B. Smith & Co., including the obligation to enforce the cause of action set forth herein.

Wherefore, plaintiff prays judgment against defendant Eloy Gin Corporation for the sum of \$4,736.85 with legal interest from January 1, 1946, and for such other relief to which it may be entitled.

Second Cause of Action

I.

Plaintiff adopts the preliminary statements of the first cause of action by reference.

II.

Plaintiff adopts the paragraph I of the first cause of action by reference.

III.

That Eloy Gin Corporation insured said bales of cotton by a policy of fire insurance with defendant Home Insurance Company.

IV.

That in and by said policy of insurance it was provided, among other things, that any loss thereunder should be settled with and payable solely to Eloy Gin Corporation and defendant Eloy Gin Corporation thereby became obligated to collect the proceeds of said policy for the benefit of plaintiff Eugene B. Smith & Co.

V.

That said policy of insurance required proof of loss to be made within sixty (60) days of the date of loss and required that action thereunder be brought within one (1) year of the date of loss.

VI.

Plaintiff incorporates by reference paragraph III of the first cause of action.

VII.

Plaintiff incorporates by reference paragraph IV of the first cause of action.

VIII.

Eloy Gin Corporation failed to make proof of loss as required by said policy within sixty (60) days of the date of loss and failed to bring action within one (1) year as provided in said policy of insurance.

IX.

As a result of said loss and damage by fire and the failure of the defendant Eloy Gin Corporation to collect the insurance thereon for the benefit of Eugene B. Smith & Co., Eloy Gin Corporation became liable to plaintiff in the amount of said damage, with interest at the legal rate from the date of said fire.

X.

Plaintiff incorporates paragraph VI of the first cause of action by reference.

XI.

Plaintiff incorporates paragraph VII of the first cause of action by reference.

XII.

Plaintiff alleges in the alternative that defendant Home Insurance Company waived the failure of defendant Eloy Gin Corporation to make proof of loss and bring suit within one (1) year as provided in said policy of insurance.

Wherefore plaintiff prays judgment against defendants for the amount of said loss and damage,

with legal interest from January 1, 1946, and for such other relief as may be meet in the premises.

FENNEMORE, CRAIG, ALLEN
& BLEDSOE,

By /s/ RICHARD FENNEMORE,
Attorneys for Plaintiff.

[Endorsed]: Filed October 27, 1950.

In the United States District Court
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District
Judge, Presiding.

MINUTE ENTRY OF
FRIDAY, OCTOBER 27, 1950

This case comes on regularly for trial this date. Richard Fennemore, Esquire, appears as counsel for the plaintiff. Joseph S. Jenckes, Jr., is present for defendant Eloy Gin Corporation and Theodore G. McKesson, Esquire, is present for defendant, The Home Insurance Company.

Louis L. Billar is present as official reporter.

It Is Ordered that the record show that Motion of defendant Eloy Gin Corporation to Dismiss Amended Complaint, Motion of defendant, The Home Insurance Company, to Dismiss Amended Complaint and Motion of defendant, The Home

Insurance Company to Dismiss Cross-Claim, and Plea in Bar are submitted to the court and the court reserves ruling thereon, and that by stipulation of counsel, the complaint is predicated upon a cause of action on contract and then will be no question of negligence on part of Eloy Gin Corporation in the case.

Plaintiff's Case

The following plaintiff's exhibits are now admitted in evidence:

- 1 Stipulation of Facts.
- 1-A Copy of Contract.
- 1-B Copy of Contract.
- 1-C Gin yard receipts.
- 1-D Fire Insurance policy.
- 1-E Marine fire insurance policy.
- 1-F Loan draft.
- 1-G Loan agreement.

Charles Churchill is now sworn and examined on behalf of the plaintiff.

Counsel for plaintiff makes offer of proof and counsel for both defendants object thereto.

It Is Ordered that the objections be sustained.

Counsel now stipulate that value of cotton in this action is \$4,028.61 in lieu of \$4,736.85.

Plaintiff's exhibit 2, Deposition of T. S. McCorkle, is now admitted in evidence.

George J. Bolt is now sworn and examined on behalf of the plaintiff.

Theodore G. McKesson is now sworn and examined on behalf of the plaintiff.

And thereupon the plaintiff rests.

Counsel for defendant Eloy Gin Corporation now moves that court enter judgment for said defendant and that plaintiff take nothing by its complaint against said defendant.

Counsel for plaintiff moves for leave to amend complaint to conform to the evidence with respect to Eloy Gin Corporation.

It Is Ordered that Plaintiff's Motion for Leave to Amend be and it is granted.

Counsel for defendant The Home Insurance Company now moves for judgment against plaintiff on ground that complaint fails to state claim and evidence fails to state claim, and there is no privity of interest between defendants.

Defendant Eloy Gin Corporation rests.

And thereupon, at 11:30 o'clock a.m., It Is Ordered that the further trial of this case be continued until 2:00 o'clock p.m., to which time the respective parties and counsel are excused.

Subsequently, at 2:00 o'clock p.m., the parties and respective counsel present pursuant to recess, further proceedings of trial are had as follows:

Counsel for plaintiff now submits proposed amendment to complaint and counsel for defendant Eloy Gin Corporation states his objections thereto.

It Is Ordered that said amendments be and they are allowed.

Both sides rest.

Counsel for defendant Home Insurance Company now moves for judgment on first cause of action and for judgment on second cause of action and for

judgment against Eloy Gin Corporation on cross-claim and states his grounds therefor.

It Is Ordered that the record show that this case is submitted on briefs and that plaintiff is allowed twenty days to file opening brief; the defendants twenty days thereafter to answer and the plaintiff ten days to reply.

[Title of District Court and Cause.]

MOTION TO DISMISS AND PLEA IN BAR,
AND ANSWER TO PLAINTIFF'S SEC-
OND CAUSE OF ACTION IN ITS
SECOND AMENDED COMPLAINT

Motion to Dismiss and Plea in Bar

Comes Now the defendant Home Insurance Company, by its attorneys, Theodore G. McKesson and Robert H. Renaud, and in appearance to plaintiff's second amended complaint and as to the second cause of action moves the Court for the following order:

To dismiss said second cause of action against this defendant upon the following grounds and reasons:

(a) That the second cause of action of said second amended complaint fails to state a claim against this defendant upon which relief may be granted.

(b) That said second cause of action of said second amended complaint is barred by the statute of limitations.

Wherefore, this defendant prays that the second cause of action of the second amended complaint be dismissed as against this defendant, that this defendant have judgment against the plaintiff, together with its costs herein incurred.

THEODORE G. McKESSON,

ROBERT H. RENAUD,

By /s/ THEODORE G. McKESSON,

Attorneys for the Defendant,

Home Insurance Company.

Answer to Second Cause of Action

In the event the foregoing motion is overruled, without waiving same, in answer to the second cause of action in the second amended complaint, the defendant Home Insurance Company, by its attorneys, Theodore G. McKesson and Robert H. Renaud, admits, denies and alleges:

I.

Admits the allegations of paragraph I thereof, being the preliminary statements of the first cause of action.

II.

Admits the allegations of paragraph II thereof, which is by reference paragraph I of the first cause of action.

III.

In answer to paragraph III this defendant admits that it had a policy of insurance in effect with Eloy Gin Corporation covering cotton and farm

products it owned and cotton of others for which it was legally liable as bailee provided it had assumed the legal risk thereof by fire, and more particularly this defendant alleges that its said policy of insurance provided as follows:

“This policy insures Eloy Gin Corporation.

“Loss, if any, to be adjusted with the Insured named therein and payable to Insured on merchandise of every description * * * consisting principally of cotton by-products, materials and supplies manufactured or in process of manufacture, and on materials for manufacturing same, including packages, labels, cases, boxes and all wrapping and packing materials, all being the property of insured or sold but not delivered or removed; and (Provided the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor), this insurance shall also cover merchandise held in trust, or on commission or consignment, or left for storage or repairs, but loss thereon shall be adjusted with and payable to the insured named in this policy; * * *”

IV.

In answer to paragraph IV thereof, this defendant admits that said policy of insurance provides that any loss should be settled with and payable solely to Eloy Gin Corporation. This defendant denies that Eloy Gin Corporation became legally obligated to collect the proceeds of said policy for the benefit of Eugene B. Smith & Company, as it

had not contracted to insure plaintiff's cotton after the plaintiff had paid for the cotton by drafts with gin yard receipts and grade cards attached, and in that regard this defendant alleges and has admitted in the Stipulation of Facts in this cause that Eugene B. Smith & Company had paid for all of said cotton prior to said fire and had insured its said cotton with National Fire Insurance Company prior to the date of said fire, and that plaintiff's Exhibits 1-A and 1-B conclusively show on their face that risk of loss by fire was upon Eugene B. Smith & Company on January 25, 1946, the date of said fire, as it had paid for said cotton and had taken legal delivery of same.

V.

Admits the allegations of paragraph V thereof.

VI.

Admits paragraph VI thereof, which by reference adopts paragraph III of the first cause of action, but in that regard alleges that it was stipulated at the time of trial that the market value of said cotton at the date of said fire was \$4,028.61.

VII.

In answer to paragraph VII thereof, which by reference adopts paragraph IV of the first cause of action, this defendant admits the allegations thereof.

VIII.

Admits the allegations of paragraph VIII thereof.

IX.

Denies the allegations of paragraph IX by reason of the facts herein alleged and alleged in other pleadings in behalf of Home Insurance Company in appearance to plaintiff's first amended complaint and the Stipulation of Facts and Exhibits thereof attached introduced in evidence by the plaintiff.

X.

Admits paragraph X thereof, which adopts by reference paragraph VI of the first cause of action.

XI.

Admits paragraph XI thereof, which adopts by reference paragraph VII of the first cause of action.

XII.

In answer to paragraph XII thereof, this defendant denies that it waived the failure of Eloy Gin Corporation to make proof of loss and to bring suit within one year, as provided in said policy of insurance.

XIII.

Further answering said second cause of action of the second amended complaint, this defendant alleges that same fails to state a claim upon which relief may be granted against this defendant.

XIV.

Further answering said second cause of action of the second amended complaint, this defendant alleges that said second cause of action is barred

by the statute of limitations, as not being instituted within one year after the date of said loss.

Wherefore, the defendant Home Insurance Company prays that the plaintiff take nothing against it by its second cause of action, and that it recover judgment against the plaintiff, together with costs herein incurred.

THEODORE G. McKESSON,

ROBERT H. RENAUD,

By /s/ THEODORE G. McKESSON,

Attorneys for the Defendant,

Home Insurance Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 3, 1950.

In the United States District Court
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District
Judge, Presiding.

MINUTE ENTRY OF
FRIDAY, MARCH 30, 1951

It Is Ordered that plaintiff, Eugene B. Smith & Company, Inc., take nothing by its complaint, and the same is hereby dismissed.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

From the Stipulation of Facts and the evidence introduced at the trial, the Court finds the following facts:

I.

a. Eugene B. Smith & Co., Inc., was at all times a corporation organized and existing under the laws of the State of Texas and was not authorized to do business in Arizona until August 14, 1946.

b. Eloy Gin Corporation is and was at all times mentioned in plaintiff's second amended complaint a corporation organized and existing under the laws of the State of Arizona.

c. The Home Insurance Company is an insurance corporation organized under the laws of the State of New York and authorized to a general insurance business in the State of Arizona.

d. The amount in controversy herein is in excess of \$3,000.00, to wit: The sum of \$4,028.61 together with interest at the rate of six per cent (6%) per annum from January 25, 1946.

e. The plaintiff claimed it was entitled to recover on an insurance policy contract for the loss of 39 bales of cotton destroyed by fire on the defendant Eloy Gin Corporation's gin yard of the value of \$4,028.61, on January 25, 1946. The defendant Eloy Gin Corporation claimed that the plaintiff, by written agreement, had assumed any

loss by fire of any cotton on its gin yard which had been paid for, and the defendant Home Insurance Company claimed that its policy of insurance did not inure to the benefit of Eugene B. Smith & Co., Inc., and that there was no privity of interest between Home Insurance Company and Eugene B. Smith & Co., and that it was only liable under its insurance policy to Eloy Gin Corporation, had Eloy Gin Corporation been responsible for loss by fire of cotton on its gin yard with Eugene B. Smith & Co., Inc., on January 25, 1946.

II.

Plaintiff and the defendants entered into a Stipulation of Facts consisting of four pages and seven paragraphs under date of October 24, 1950, together with seven exhibits numbered A to G, inclusive. Said Stipulation of Facts and the Exhibits A to G, inclusive, were introduced in evidence by the plaintiff as Plaintiff's Exhibits 1-A to 1 in evidence.

III.

Plaintiff had, by written agreement, pursuant to paragraph (2) of the Stipulation of Facts, assumed all risk of loss by fire of any cotton on Eloy Gin Corporation's gin yard that it had theretofore paid for, and that at the date of said fire on January 25, 1946, there were 39 bales of cotton already paid for by the plaintiff and still remaining on the defendant Eloy Gin Corporation's gin yard which it had insured under its marine insurance policy with National Fire Insurance Company.

IV.

Eugene B. Smith & Co., Inc., suffered no loss by reason of the destruction of said 39 bales of cotton by fire, as it was reimbursed and indemnified by loan receipts for said loss by its insurance carrier, National Fire Insurance Company, and had by its written agreement relieved Eloy Gin Corporation from any liability for any cotton on Eloy Gin Corporation's gin yard that had been paid for in the event of fire.

V.

The loan receipt taken by National Fire Insurance Company from the plaintiff is legal. However, the plaintiff cannot recover, nor can National Fire Insurance Company recover, from Eloy Gin Corporation by reason of the plaintiff's contract to assume any liability for the destruction of the cotton by fire that it had paid for.

VI.

The 39 bales of cotton evidenced by gin receipts and referred to in the evidence and the Stipulation of Facts were all paid for prior to the date of the fire.

VII.

Eugene B. Smith & Co., Inc., had no contractual relations with the defendant Home Insurance Company, and the Home Insurance Company's standard New York form of fire insurance policy, introduced in evidence, was for the sole benefit of Eloy Gin Corporation and did not inure or react in favor of any other person or corporation, including

the plaintiff or its assignee, as said policy contains, among other things, the following provision:

“This policy insures Eloy Gin Corporation. Loss, if any, to be adjusted with the Insured named herein and payable to Insured on merchandise of every description (except as hereinafter excluded) consisting principally of cotton by-products, materials and supplies * * * within the limits of the State of Arizona.”

VIII.

The New York standard form of fire insurance policy of Home Insurance Company provided that proof of loss should be filed with the defendant Home Insurance Company within sixty (60) days after the loss unless the time was extended in writing. Eloy Gin Corporation did file proof of loss with the defendant Home Insurance Company for other cotton, but did not file proof of loss for the 39 bales of cotton for which the plaintiff is seeking to recover the value at any time.

IX.

Eloy Gin Corporation did not bring an action against Home Insurance Company, nor did the plaintiff bring an action against the defendant Home Insurance Company for any loss of the 39 bales of cotton within twelve months from the date of the loss, as provided in the New York standard form of fire insurance policy, adopted by the laws of the State of Arizona, which said policy, among other things, provides:

“No suit or action on this policy for the

recovery of any claim shall be sustainable in any court of law or equity unless all requirements of this policy shall have been complied with, and unless commenced within twelve months after inception of the loss.”

Conclusions of Law

From the foregoing facts, the Court concludes as matters of law:

(1) The court has jurisdiction of the parties and of the subject matter under the provisions of Sections 1332, 1335 and 1441, of Title 28 of the United States Code.

(2) The plaintiff is not entitled to recover anything on its amended complaints from the defendant Eloy Gin Corporation or from the defendant Home Insurance Company.

(3) The defendant Eloy Gin Corporation is not entitled to recover on its cross-claim against the defendant Home Insurance Company.

(4) The plaintiff Eugene B. Smith & Co., Inc., not being a party to the contract of insurance between Eloy Gin Corporation and Home Insurance Company, cannot maintain an action thereon.

(5) The plaintiff Eugene B. Smith & Co., Inc., by written agreement with the defendant Eloy Gin Corporation, contracted to assume any loss by fire of any cotton which it had paid for prior to the date of the fire, and as to the alleged damage in this action the Court concludes that the 39 bales of cotton of the approximate value of \$4,028.61 were

paid for by the plaintiff at a date prior to the date of the fire.

Settled, Adopted and Signed this 18th day of April, 1951.

/s/ DAVE W. LING,

United States District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 18, 1951.

In the District Court of the United States
for the District of Arizona
No. Civil 1135

EUGENE B. SMITH & CO., INC.,

Plaintiff,

vs.

ELOY GIN CORPORATION and HOME IN-
SURANCE COMPANY,

Defendants.

JUDGMENT UPON THE ISSUES

Upon due consideration of the pleadings, the admissions of the parties, the Stipulation of Facts, and oral and documentary evidence introduced at the time of trial, and the Findings of Fact and Conclusions of Law heretofore settled, signed and filed herein, and the Court being fully advised in the premises, it is

Ordered, Adjudged and Decreed:

(1) That the plaintiff take nothing by its action as against the defendant Eloy Gin Corporation or the defendant Home Insurance Company, or either of them.

(2) That the defendant Eloy Gin Corporation take nothing by reason of its cross-claim against the defendant Home Insurance Company.

(3) That the defendant Home Insurance Company do have and recover of and from the plaintiff Eugene B. Smith & Co., Inc., the sum of \$175.70 as and for its costs taxed and allowed herein.

(4) That the defendant Eloy Gin Corporation do have and recover of and from the plaintiff Eugene B. Smith & Co., Inc., the sum of \$. as and for its costs taxed and allowed herein.

Done in Open Court this 18th day of April, 1951.

/s/ DAVE W. LING,

United States District Judge.

Approved as to form only, pursuant to Local Rule 22.

FENNEMORE, CRAIG, ALLEN
& BLEDSOE,

By /s/ RICHARD FENNEMORE,
Attorneys for the Plaintiff.

Approved by:

FENNEMORE, CRAIG, ALLEN
& BLEDSOE,

By ,
Attorneys for the Plaintiff.

Defendants' Proposed Judgment:

[Endorsed]: Filed April 11, 1951.

Judgment:

[Endorsed]: Filed and docketed April 18, 1951.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes Now plaintiff above named and respectfully moves the Court for a new trial of the above-entitled action upon the following grounds:

1. That the Judgment is contrary to the evidence.

2. That finding of fact numbered I a is contrary to the evidence.

3. That finding of fact numbered III is contrary to the evidence.

4. That finding of fact numbered IV is contrary to the evidence.

5. That finding of fact numbered V, except the first sentence thereof, is contrary to the evidence.

6. The conclusion of law (2) is contrary to the evidence and the law.

7. That the conclusion of law (5) is contrary to the evidence and the law.

FENNEMORE, CRAIG, ALLEN
& BLEDSOE,

By /s/ RICHARD FENNEMORE,
Attorneys for Plaintiff.

[Endorsed]: Filed April 27, 1951.

In the United States District Court
for the District of Arizona

[Title of Cause.]

Honorable Dave W. Ling, United States District
Judge, Presiding.

MINUTE ENTRY OF
MONDAY, JUNE 11, 1951

Plaintiff's Motion for New Trial comes on regularly for hearing this date. Richard Fennemore, Esquire, appears for the plaintiff. Theodore McKesson, Esquire, is present for the defendant, Home Insurance Company. Said motion is submitted without argument.

It Is Ordered that said Plaintiff's Motion for New Trial be and it is denied.

Counsel for defendant now moves for order amending findings herein, and

It Is Ordered that said motion be and it is denied.
Docketed June 11, 1951.

[Title of District Court and Cause.]

PLAINTIFF'S NOTICE OF APPEAL

Notice Is Hereby Given that the plaintiff above named hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of the United States District Court, for the District of Arizona, rendered and entered April 18, 1951, and from the whole of said judgment and from the order of said District Court entered June 11, 1951, denying the plaintiff's motion for new trial.

FENNEMORE, CRAIG, ALLEN
& BLEDSOE,

By /s/ RICHARD FENNEMORE,
Attorneys for Plaintiff.

[Endorsed]: Filed July 9, 1951.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge that we, our successors and assigns, are bound to pay to Eloy Gin Corporation and Home Insurance Company, and each of them, defendants above named, the sum of two hundred fifty dollars (\$250.00).

The condition of this bond is that whereas the plaintiff has appealed to the Circuit Court of Ap-

peals for the Ninth Circuit by notice of appeal filed the 9th day of July, 1951, from the judgment of this Court entered April 18, 1951, and from the order of this Court denying plaintiff's motion for new trial, entered June 11, 1951; if the plaintiff shall pay all costs adjudged against it if the appeal is dismissed, or the judgment affirmed, or such costs as the appellate court may award if the judgment is modified, then this bond is to be void, but if the plaintiff fails to perform this condition, payment of the amount of this bond shall be due forthwith.

EUGENE B. SMITH & CO.,
INC.,

By /s/ RICHARD FENNEMORE,
One of Its Attorneys,
Principal.

[Seal] THE FIDELITY AND CASUALTY COM-
PANY OF NEW YORK,

By /s/ LESTER B. CURTIS,
Attorney,
Surety.

[Endorsed]: Filed July 9, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

Good cause appearing therefor, It Is Ordered that the plaintiff's time to file the record on appeal

and docket the appeal herein in the United States Court of Appeals for the Ninth Circuit, be and it is extended to and including September 15, 1951.

Dated this 19th day of July, 1951.

/s/ DAVE W. LING,

United States District Judge.

[Endorsed]: Filed July 20, 1951.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

The Plaintiff above named hereby designates the following portions of the record to be certified and transmitted to the United States Court of Appeals for the Ninth Circuit, to wit:

1. All pleadings except plaintiff's complaint, filed January 12, 1948; defendants' Eloy Gin Corporation and Home Insurance Company, Joint Answer thereto, filed March 9, 1948; plaintiff's Amended Complaint, filed September 27, 1950.
2. Stipulation of facts, dated October 24, 1950.
3. Deposition of T. S. McCorkle, filed October 10, 1950.
4. All exhibits.
5. Reporter's Transcript of Evidence, filed herewith.
6. Findings of fact and conclusions of law, filed April 18, 1951.

7. Judgment.

8. Plaintiff's Motion for New Trial, filed April 27, 1951, and the order denying the motion.

9. Minute Entries of October 27, 1950, except entry showing filing of subpoena.

10. Plaintiff's Notice of Appeal, filed July 9, 1951.

11. Plaintiff's Bond on Appeal, filed July 9, 1951.

12. Statement of points upon which plaintiff intends to rely upon its appeal, filed concurrently herewith.

13. Order Extending Time, dated July 19, 1951.

14. This Designation.

FENNEMORE, CRAIG, ALLEN
& BLEDSOE,

By /s/ RICHARD FENNEMORE.

[Endorsed]: Filed August 8, 1951.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
PLAINTIFF INTENDS TO RELY UPON
ITS APPEAL

The Plaintiff above named has perfected an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the United States District Court for the District of

Arizona entered in the above-matter and from the order of said District Court denying plaintiff's motion for a new trial entered therein and intends to rely upon the following points upon its appeal to wit:

I.

The judgment entered is not justified by the evidence and is contrary to law.

II.

Finding of fact No. III is contrary to the evidence.

III.

Finding of fact No. IV is contrary to the evidence.

IV.

Finding of fact No. V is contrary to the evidence.

V.

Conclusion of Law No. II is erroneous.

VI.

Conclusion of Law No. V is erroneous except that portion thereof concluding that the 39 bales of cotton were paid for by the plaintiff at a date prior to the date of the fire.

VII.

The court erred in sustaining defendants' objection to plaintiff's offer of proof as to the custom of the trade with respect to billing for insurance and storage charges (R.T. 15, 17-18).

VIII.

On the uncontradicted evidence, the court should have found that by the delivery of warehouse receipts covering the cotton in question, Defendant Eloy Gin Corporation became a warehouseman as to Eugene B. Smith and Company and by the terms of the receipt was obligated to insure the cotton and is therefore liable to plaintiff either because the insurance which it obtained did not cover the cotton or if it did cover the cotton then for its failure to take the necessary steps to collect the insurance.

FENNEMORE, CRAIG, ALLEN
& BLEDSOE,

By /s/ RICHARD FENNEMORE,
Attorneys for Plaintiff.

Service of Copy acknowledged.

[Endorsed]: Filed August 8, 1951.

In the District Court of the United States
In and for the District of Arizona

No. Civ-1135

EUGENE B. SMITH AND COMPANY, INC.,

Plaintiff,

vs.

ELOY GIN CORPORATION and HOME INSURANCE COMPANY,

Defendants.

REPORTER'S TRANSCRIPT

Before: Hon. Dave W. Ling, Judge.

Appearances:

For the Plaintiff:

FENNEMORE, CRAIG, ALLEN &
BLEDSON, By
RICHARD FENNEMORE, ESQ.

For the Defendants:

EVANS, HULL, KITCHEL &
JENCKES, By
JOSEPH S. JENCKES, JR., ESQ.,
For the defendant, Eloy Gin
Corporation.

THEODORE G. McKESSON, ESQ.,
For the defendant,
Home Insurance Company.

The above entitled and numbered cause came on

duly and regularly for hearing before Hon. Dave W. Ling, Judge of the above-entitled Court, presiding without a jury, commencing at the hour of 10 o'clock a.m. on the 27th day of October, 1950, at Phoenix, Arizona.

The plaintiff, Eugene B. Smith and Company, was represented by its attorneys, Messrs. Fennemore, Craig, Allen & Bledsoe, by Richard Fennemore, Esq.

The defendant, Eloy Gin Corporation, was represented by Messrs. Evans, Hull, Kitchel & Jenckes, by Joseph S. Jenckes, Jr., Esq.

The defendant, Home Insurance Company, was represented by Theodore G. McKesson, Esq.

The following proceedings were had:

The Clerk: Civil 1135, Phoenix, Eugene B. Smith and Company, Inc., versus Eloy Gin Corporation and Home Insurance Company, Defendants, for trial.

Mr. Jenckes: If the Court please, I would like to be heard for just a few minutes on the Motion to Dismiss the Complaint which is interposed by the Eloy Gin.

Mr. McKesson: We are all ready.

The Court: That should have been heard before the case was set for trial, I imagine.

Mr. Fennemore: I would suggest to the Court, there are so many angles in this case that we might go ahead and put on a little evidence and brief the matter, if your Honor please, because there are at least a half dozen points on both sides. It is a thoroughly involved case.

The Court: That occurred to me when the Clerk brought me the file just a few minutes ago.

Mr. Jenckes: I think that is probably true, but I think, though, in 60 seconds if you will look at the complaint you will find it doesn't state a cause of action against Eloy Gin.

The Court: Perhaps you can assume that, but the Court can't. It would take me longer than 60 seconds. [2*]

Mr. McKesson: If your Honor please, since this amended complaint was filed by Eugene B. Smith and Company, I filed separate Motions and separate Answers, amended Answer to their amended complaint for and on behalf of the Eloy Gin Corporation and for and on behalf of the Home Insurance, two separate ones, and then I noticed it and then we had stipulated until the time of the trial and then I wrote the Eloy Gin Corporation and told them that there might be some diversity of interest between the Home and Eloy and now Mr. Jenckes is representing Eloy and since then I filed an amended Answer and Motions, so I understood it would be taken up at the time of the trial.

The Court: At the time you filed your Answer for both defendants, did you file a Motion to Dismiss the Complaint?

Mr. McKesson: Yes, sir.

The Court: Was that argued?

Mr. McKesson: No, it was understood by Mr. Fennemore, and the more we talked about that, that it would be all set over until the 27th. You

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

see, he filed it just a few days before the trial and then we continued it from the 2nd of October—what was it, or the 27th? [3]

Mr. Fennemore: Sometime during the month.

Mr. McKesson: And I noticed it and it was continued. I don't know if the Court's records show the continuation or not.

The Court: Why couldn't you go ahead and put in the proof that you have and submit it all at one time?

Mr. Fennemore: I would prefer to do that, your Honor. Frankly, particularly this cross-complaint matter that has come on very close to the time of trial, I think it ought to be adequately briefed before your Honor before we let the Motion be submitted, with the understanding that it be briefed afterwards.

Mr. McKesson: I have the brief of mine already on file and as far as my motions are concerned.

Mr. Jenckes: If the Court please, as far as the defendant Eloy Gin is concerned, I don't think I would have any objection to proceeding with the evidence if I know where I stand, particularly to what purported cause of action is alleged against Eloy in the complaint. Now, I think Mr. Fennemore attempts to allege a cause of action in contract against us for failure to secure insurance, and if that is the case, then I would [4] be prepared to go ahead, but if the Court takes the view, or if Mr. Fennemore is contending that he has alleged in his complaint a liability on our part as warehouse men, and there are allegations of negligence that I am going to have to meet this morning,

and that matter should be disposed of before we go ahead.

Mr. Fennemore: The complaint is not based on negligence because there is no evidence one way or the other as to whether there was negligence or not. This fire just occurred. Nobody knows just how.

Mr. Jenckes: In other words, I take it, based on Mr. Fennemore's statement, I would not at any time have the burden to show where we were negligent?

The Court: Apparently not.

Mr. Jenckes: That is all right with me if that is the situation. I just want to know where I stand, that is all.

The Court: All right, the record may show that all motions are submitted and the Court reserves ruling on them.

Mr. Jenckes: I think, should the record also show, if your Honor please, by stipulation of counsel that the complaint is predicated upon [5] a cause of action in contract and that there will be no question of negligence on the part of Eloy Gin in this case?

The Court: All right, if that is agreeable.

Mr. Fennemore: If the Court please, we have entered into a stipulation as to most of the facts in the case. At this time I offer that in evidence. There are a number of exhibits attached to the stipulation and it covers practically all of the documentary matters in the case.

(Thereupon the documents were received and marked as Plaintiff's Exhibit 1 in Evidence.)

PLAINTIFF'S EXHIBIT No. 1

In the United States District Court
for the District of Arizona
No. Civ. 1135

EUGENE B. SMITH & CO., INC.,

Plaintiff,

vs.

ELOY GIN CORPORATION and HOME IN-
SURANCE COMPANY,

Defendants.

STIPULATION OF FACTS

Come Now the plaintiff and the defendants, by their respective attorneys, and for the convenience of Court and counsel present the following facts which are undisputed and may be taken as true:

(1) Plaintiff is a corporation organized and existing under the laws of the State of Texas and was not authorized to do business in Arizona until August 14, 1946. The defendant Eloy Gin Corporation is a corporation existing under the laws of the State of Arizona. The defendant Home Insurance Company is a corporation organized under the laws of the State of New York and authorized to do a general insurance business in the State of Arizona. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

(2) On or about the 7th day of November, 1945, the Eloy Gin Corporation as seller and Eugene B. Smith dba Eugene B. Smith & Co. as buyer en-

tered into two separate written contracts for the purchase and sale of cotton. The first contract, No. P-200, dated November 7, 1945, covered 300 bales of cotton, and the second contract, No. P-201, covered 1,000 bales of cotton. Said contracts were identical with the exception that the 1,000 bales contract covered a price of 85 points on the November market, with all other conditions the same as under Contract No. P-200. Attached hereto are the two original contracts, marked Exhibit A and Exhibit B, respectively. That, among other things, each of said written contracts provided in substance that the seller sold and the buyer bought the respective bales of cotton at a certain price on the terms set forth in said contracts, and each of said written contracts provided regarding insurance as follows:

“Insurance at sellers risk until payment completed.

“Reimbursement Sight Draft, gin-yard receipts attached, also Smith/Doxey cards, Draw on Eugene B. Smith & Co., care Valley National Bank, Phoenix.”

(3) That each of said contracts was completed in full accordance with its terms. As cotton was ginned and baled, the bales were marked and gin yard receipts issued for each bale, the gin yard receipts being issued by Eloy Gin Corporation to Eloy Gin Corporation and thereafter sight drafts were drawn on Eugene B. Smith & Co., in care of the Valley National Bank, Phoenix. The gin yard receipts were endorsed in blank by Eloy Gin Cor-

poration and attached to the sight drafts. As the drafts were paid, the gin yard receipts were delivered by the Valley National Bank, Phoenix, to Eugene B. Smith & Co. The bales of cotton remained in the possession of Eloy Gin Corporation until removed from its possession by surrender of gin yards receipts and delivery of the cotton to the one presenting the receipts. All of said cotton was paid for in accordance with the terms of said agreements and all delivered, and the gin yard receipts were surrendered with the exception of 40 gin yard receipts. Attached hereto and made a part hereof are 39 gin yard receipts, marked Exhibit C.

(4) On or about the 25th day of January, 1946, a fire occurred at the gin yard of Eloy Gin Corporation at Eloy, Arizona, and 39 of the 40 bales of cotton for which the plaintiff Eugene B. Smith & Co. had gin yard receipts and on which delivery had not been taken and on which gin yard receipts had not been surrendered, were destroyed in said fire. That each of said receipts contained the weight, date of issuance of the receipt, the name of the party to whom issued, and for whose account issued, and contained various other provisions as shown by the receipts (Exhibit C attached).

(5) That prior to January 25, 1946, as hereinabove stated, all of the 1300 bales of cotton evidenced by the receipts were paid for and the gin receipts delivered to Eugene B. Smith & Co., and Eugene B. Smith & Co. had surrendered up the receipts to Eloy Gin Corporation and removed all

of the cotton with the exception of 40 bales, for which it held receipts on January 25, 1946. In said fire 39 of said bales of cotton evidenced by the gin receipts were destroyed by fire. That on the 25th day of January, 1946, the Home Insurance Company had in full force and effect a policy of fire insurance issued to Eloy Gin Corporation, being No. 6857, dated August 1, 1945, attached hereto and marked Exhibit D.

(6) That on January 25, 1946, the date of said fire, Eugene B. Smith & Co. held a policy of marine fire insurance which was in full force and effect, being policy No. OC-58587 of the National Fire Insurance Company, copy of which is hereto annexed and marked Exhibit E.

(7) That after said fire, the National Fire Insurance Company, through the Cotton Insurance Association, paid to Eugene B. Smith and Co. the sum of four thousand eight hundred sixty-seven and 43/100 dollars (\$4,867.43) by its loan draft dated February 13, 1946, which is attached hereto marked Exhibit F, and in consideration of said payment, Eugene B. Smith & Co. executed, under date of February 18, 1946, Agreement hereto attached marked Exhibit G; that the 39 bales of cotton destroyed by fire and involved in this action, were included in the 40 bales covered by Exhibits F and G, and of the total sum of four thousand eight hundred sixty seven and 43/100 dollars (\$4,867.43), the sum of four thousand seven hun-

dred thirty six and 85/100 dollars (\$4,736.85) represents payment for said 39 bales.

Dated this 24th day of October, 1950.

FENNEMORE, CRAIG,
ALLEN & BLEDSOE,

By /s/ RICHARD FENNEMORE,
Attorneys for Plaintiff.

/s/ THEODORE McKESSON,
Attorney for Defendant,
Home Insurance Company.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ JOSEPH JENCKES, JR.,
Attorneys for Defendant,
Eloy Gin Corporation.

Admitted October 27, 1950.

Mr. McKesson: I suggest, if your Honor please, that each one of the exhibits attached may be received and should be also introduced as Plaintiff's, whatever you want to call them, 1 or A in evidence. You see, we have a sheet here so in addition to the stipulation of facts, that these be introduced separately so we can refer to them as we go along.

The Clerk: The stipulation will be 1 and these are Number A to G. That will be Number 1-A to 1-G, inclusive.

(Thereupon the documents were received and marked as Plaintiff's Exhibits 1-A to 1-G, inclusive, in evidence.) [6]

PLAINTIFF'S EXHIBIT NO. 1-A

Eugene B Smith & Co
Eugene B. Smith & Co. 1-4
COTTON EXCHANGE BUILDING
DALLAS, TEXAS
Civ-1135-64



CONFIRMATION

Phoenix, Arizona. Texas, November 7th 1945
OCT 27 1950
Floy Ginn Corporation, (Jones and Cobb crop)
Floy, Arizona.

Dear Sir(s):

We hereby confirm having purchased from you today, through conversation with Jack Pretzer,
THREE HUNDRED (300) Bales Cotton; at (see below) lbs. per lb., to be delivered by you in
accordance with the rules of The Texas Cotton Association (see extract on back hereof) governing this con-
tract, and on the following terms. (Mixed packed bales to be classed by the low side only.)

Grade Per Smith/Doxey cards, including 68 cards on hand already; unculled.
Staple " " " " " " " "
Price @ November W.F.A. prices for each quality, plus 75 points premium, f.o.b. Gin Yard,
at Floy, Arizona.
Delivery In lots of not less than 100 B/C, as fast as ginned and cards obtained.,
Terms Cal./Ariz. Texas Cotton Association Contract.
Weights Original Gin Weights.
Insurance at sellers risk until payment completed.
Reimbursement Sight Draft, gin-yard receipts attached, also Smith/Doxey cards,
Draw on Eugene B. Smith & Co., care Valley National Bank, Phoenix.
Differences: Good Mid Strict Low Mid. INVOICED IN DUPLICATE, Strict Good Ord.
Strict Mid. Low Mid. Good Ord.

Remarks: If possible, each delivery to be averaged, rather than a separate calculation
for every grade and staple.

The Cotton covered by this confirmation is bought subject to the full compliance on the part of the seller (without ex-
pense to the buyer) with all the provisions of the United States laws and the seller hereby expressly agrees to provide the
buyer with all proper licenses or certificates or any other similar requirements which identify the cotton covered hereby as
free from the penalty imposed by the Agricultural Adjustment Act of 1938, and if such forms show that the cotton is subjec-
t to marketing penalty, or if the forms are not furnished before delivery of the cotton or passage of title to it, the seller
expressly authorizes the buyer to deduct from the purchase price of the cotton an amount equal to the penalty imposed by
such Act.

The seller hereby agrees that final settlement under this contract shall be had on outturn accounts as rendered the
seller by the buyer, unless promptly on receipt of each such account, the seller applies for a revision of such account. In
such event, should the parties fail to mutually agree to a revision of the account, the matter in controversy shall be ar-
bitrated under and in accordance with the Rules of the Texas Cotton Association, relating to arbitration.

It is expressly understood and agreed by all parties to this contract, whether members of the Texas Cotton Association
or non-members, that any controversy which may arise in connection with said contract shall, upon request of either
party to the contract, be submitted to the Arbitration Committee of The Texas Cotton Association for adjustment in accor-
dance with the rules of said Association governing arbitration. (Copy of these rules may be secured by applying for the
same to The Texas Cotton Association, Waco, Texas.)

This evidences the entire contract between the parties hereto, and all terms, provisions and conditions relating thereto
and supercedes all prior negotiations, agreements and conditions.
Failure to return this or other signed acknowledgment or prompt correction in case of error will be understood as your
approval and acceptance of the sale, terms and conditions as herein stated.

We hereby confirm sale on terms and
conditions stated above.
EUGENE B. SMITH & CO.
FLQY GIN CORPORATION
Per *M. Churchhill* agt.
By _____

This policy, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; PROVIDED that the mortgagee shall notify this Company of any change of ownership or increase of hazard which shall come to the knowledge of said mortgagee, and unless permitted by this policy, it shall be noted hereon; and PROVIDED further that upon failure of the insured to render proof of loss, such mortgagee, upon notice, shall render proof of loss in the form herein specified within ninety-one days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit.

Failure upon the part of the mortgagee to comply with any of the foregoing obligations shall render the insurance under this policy null and void as to the interest of the mortgagee.

This policy may be cancelled as to the interest of any mortgagee named hereon by giving such mortgagee ten days written notice.

If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage.

The word "mortgagee" shall be construed to mean mortgagee or trustee.

SECTION IV

BASIC CONDITIONS

1 Concealment, This entire policy shall be void if, whether
2 fraud, before or after a loss, the insured has wil-
3 fully concealed or misrepresented any ma-
4 terial fact or circumstance concerning this insurance, or the
5 subject thereof, or the interest of the insured therein, or in
6 case of any fraud or false swearing by the insured relating
7 thereto.
8 Excepted This policy shall not cover accounts, money,
9 property, currency, securities, deeds, or evidences of
10 debt; nor, unless specifically named hereon,
11 cloth awnings, records and books of records (except for their
12 physical value in blank), bullion, animals, motor vehicles, or
13 aircraft.
14 Hazards not This Company shall not be liable for loss
15 included, by fire or other Perils insured against in
16 this policy caused, directly or indirectly,
17 by: (a) enemy attack by armed forces, including action taken
18 by military, naval, or air forces in resisting an actual or an
19 immediately impending enemy attack; (b) invasion; (c) in-
20 surrection; (d) rebellion; (e) revolution; (f) civil war; (g)
21 usurped power; (h) order of any civil authority except acts
22 of destruction at the time of and for the purpose of pre-
23 venting the spread of fire, provided that such fire did not
24 originate from any of the hazards excluded by this policy;
25 (i) neglect of the insured to use all reasonable means to save
26 and preserve the property at and after a loss, or when the
27 property is endangered by fire in neighboring premises; (j)
28 nor shall this Company be liable for loss by theft; (k) nor for
29 any electrical injury or disturbances to electrical appliances,
30 devices, or wiring resulting from artificial causes.
31 Conditions Unless otherwise provided in writing added
32 suspending or hereto, this Company shall not be liable
33 restricting for loss occurring (a, b, and c applicable
34 insurance, only to Coverage F—Fire):
35 (a) while the hazard is increased by any
36 means within the knowledge and control of the insured, pro-
37 vided such increase in hazard is not usual and incidental to the
38 occupancy as hereon described; or
39 (b) while a described building, whether intended for occupancy
40 by owner or tenant, is vacant beyond a period of thirty con-
41 secutive days; or
42 (c) as a result of explosion or riot, unless fire ensue, and in
43 that event for loss by fire only; or
44 (d) following a change in ownership of the insured prop-
45 erty; or
46 (e) while any other stipulation or condition of this policy is
47 being violated.
48 Changes or Changes in this policy may be made and
49 additions, Perils added hereon only by written en-
50 dorsement properly executed by an author-
51 ized agent of this Company and attached hereto; but no pro-
52 vision may be waived except such as by the terms of this
53 policy is subject to change.
54 Cancellation The insured may cancel this policy by notice
55 of policy, to this Company; upon surrender of
56 the policy this Company shall refund the
57 short rate unearned paid premium. This Company may cancel
58 this policy by giving the insured five days written notice; such
59 notice shall state that the pro rata unearned paid premium, if
60 not tendered, will be refunded on demand.
61 Pro rata This Company shall not be liable for a
62 liability, greater proportion of any loss than the
63 amount hereby insured shall bear to the
64 whole insurance covering the property against the Peril in-
65 volved, whether collectible or not; except if any article or
66 piece of personal property, covered hereunder by a general
67 Item (i.e., one covering several articles), is insured specifi-
68 cally (without an excess provision) under this, or any other
69 policy, then such general Item shall apply as excess over the
70 specific insurance and pay only for any actual loss sustained
71 over the amount of specific insurance.

72 Requirements in The insured shall give immediate notice to
73 case loss occurs, this Company of any loss, protect the prop-
74 erty from further damage, separate the dam-
75 aged and undamaged personal property, and furnish a com-
76 plete inventory of all property insured by this policy showing
77 in detail all costs. The insured, as often as may be reasonably
78 required, shall exhibit to any person designated by the Com-
79 pany all that remains of any property herein described, and
80 submit to examinations under oath by any person named by
81 this Company, and subscribe the same; and, as often as may
82 be reasonably required, shall produce for examination all books
83 of account, bills, invoices, and other vouchers, or certified
84 copies thereof if originals be lost, at such reasonable time and
85 places as may be designated by this Company or its representa-
86 tive, and shall permit extracts and copies thereof to be made.
87 Within ninety-one days after the loss, unless such time is
88 extended in writing, the insured shall render to this Company
89 a proof of loss signed and sworn to by the insured. Such proof
90 of loss shall reveal to the best knowledge and belief of the
91 insured the following: the time and cause of the loss; the in-
92 terest of the insured and all others in the property, including
93 any encumbrances thereon; all contracts of insurance, whether
94 valid or not, covering such property; the actual cash value of
95 each item of property and the amount of loss thereto; and by
96 whom and for what purposes the building was occupied at the
97 time of loss. No provision, stipulation, or forfeiture of this
98 policy shall be waived by any requirement, act, or proceeding
99 of this Company relating to investigation, appraisal, or ad-
100 justment of any loss.
101 Appraisal. In case the insured and this Company shall
102 fail to agree as to the actual cash value or
103 the amount of loss, then, on the written demand of either,
104 each shall select a competent and disinterested appraiser and
105 notify the other of the appraiser selected within twenty days
106 of such demand. The appraisers shall first select a competent
107 and disinterested umpire; and failing for fifteen days to agree
108 upon such umpire, then, on request of the insured or this
109 Company, such umpire shall be selected by a judge of a dis-
110 trict court of a judicial district where the loss occurred. The
111 appraisers shall then appraise the loss, stating separately
112 actual cash value and loss to each item; and, failing to agree,
113 shall submit their differences only to the umpire. An award in
114 writing, so itemized, of any two when filed with this Company,
115 shall determine the amount of actual cash value and loss. Each
116 appraiser shall be paid by the party selecting him and the
117 expenses of appraisal and umpire shall be paid by the parties
118 equally.
119 Company's It shall be optional with this Company to
120 options, take all, or any part, of the property at the
121 agreed or appraised value, and also to re-
122 pair, rebuild, or replace the property destroyed or damaged
123 with other of like kind and quality within a reasonable time,
124 on giving notice of its intention so to do within thirty days
125 after the receipt of the proof of loss herein required.
126 Abandonment. There can be no abandonment to this Com-
127 pany of any property.
128 When loss The amount of loss for which this Com-
129 payable, pany may be liable shall be payable sixty
130 days after proof of loss, as herein provided.
131 is received by this Company and ascertainment of the loss is
132 made either by agreement between the insured and this Com-
133 pany expressed in writing or by the filing with this Company
134 of an award as herein provided.
135 Suit. No suit or action on this policy for the
136 recovery of any claim shall be sustainable
137 in any court of law or equity unless all the requirements of
138 this policy shall have been complied with, and unless com-
139 menced within two years and one day next after cause of ac-
140 tion accrues.
141 Subrogation. This Company may require from the in-
142 sured an assignment of all right of recov-
143 ery against any party for loss to the extent that payment
144 therefor is made by this Company.

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached or appended hereto.

In Witness Whereof this Company has executed and attested these presents; but this policy shall not be valid unless counter-
signed by an authorized Agent of this Company.

Secretary.

President.

PLAINTIFF'S EXHIBIT No. 1-C

Original Negotiable

Bale and Receipt
Fire
No. 3713

Yard Receipt and Weight Certificate

Issued by
Eloy Gin Corporation

To Eloy Gin Corporation, c/o J. E. Tucker, the
Depositor.

Farm.....

One Bale Short Staple Cotton Stored in Open Yard
at Eloy Gin Corporation

Gross Wt. 520 Lbs.

Mark

Eloy, Ariz., 12-20, 1945

Eloy Gin Corporation Hereby Certifies:

First: That it has this day received on open storage in its gin yard, for the account of and deliverable to the depositor or order, the bale of cotton, all as above designated, named and described, subject to the Uniform Warehouse Receipt Act of Arizona and the terms and conditions of this receipt.

Second: That the correct gross weight of said bale of cotton on this day is as above shown, but is subject to and not guaranteed against shrinkage due to moisture or other natural causes; and

Third: That said bale of cotton has been insured, while stored as aforesaid under this receipt against direct loss and/or damage by fire except as

limited and provided in insurance policy covering same.

This Company will deliver said cotton in said yard to said depositor, or order, upon surrender of the original of this receipt properly endorsed and the payment of all charges against said cotton. This company is not liable for loss of or damage to said cotton by the elements, public enemy, or any other cause beyond its control, or for the grade, shrinkage in weight, defects or quality inherent in the cotton. This company claims a lien on said cotton for all its unpaid charges against the same.

Unpaid Charges:

- (1) Ginning, Bagging and Ties, Storage and Insurance for first twenty days \$. Pd.
- (2) Storage and insurance cents for each day or fraction of day after the first 20 days and;
- (3)

Insurance Paid to

ELOY GIN CORPORATION,

By /s/ NELLIE ROGUS,

**Authorized Agent and
Weighmaster.**

“All of the 38 other gin yard receipts in this exhibit are the same as the foregoing, except for the number, the gross weight shown, the day of month and the name of the person following the direction ‘To Eloy Gin Corp.’ ”

Admitted October 27, 1950.

No. 6857

RENEWAL OF NO.

The Home Insurance Company

NEW



YORK

NEW YORK

ORGANIZED 1853

COUNT . . . \$ 100% of Limits
 RATE 2.888 PREMIUM \$ 866.40 } TOTAL
 EXTENDED COVERAGE* RATE .068 PREMIUM \$ 20.40 } PREMIUM \$ 886.80
 Insurance attaches in connection with Extended Coverage Perils unless "Rate" and "Premium" is specified above and Extended Coverage
 is attached to this policy.

In Consideration of the Provisions and Stipulations herein or added hereto

OF EIGHT HUNDRED EIGHTY-SIX AND 80/100- - - - - DOLLARS PREMIUM

company, for the term of One year

the 1st day of August, 1945 at noon, Standard Time, at

the 1st day of August, 1946 at location of property involved,

amount not exceeding 100% OF LIMITS - - - - - Dollars,

insure ELOY GIN CORPORATION

legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding
 amount which it would cost to repair or replace the property with material of like kind and quality within a reason-
 able time after such loss, without allowance for increased cost of repair or reconstruction by reason of any ordi-
 nance or law regulating construction or repair, and without compensation for loss resulting from interruption of
 business or manufacture, nor in any event for more than the interest of the insured, against all DIRECT LOSS BY FIRE,
 THEFT AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT
 HEREINAFTER PROVIDED, to the property described hereinafter while located or contained as described in this
 policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for
 preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated,
 and are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may
 be added hereto, as provided in this policy.

IN WITNESS WHEREOF, this Company has executed and attested these presents; but this policy shall not be valid
 unless countersigned by the duly authorized Agent of this Company at

W. B. Reynolds
 Secretary
 1st day of August

19 45

Edward Z. Smith
 President

Agent

GUARDIAN INSURANCE AGENCY

1 Concealment, This entire policy shall be void if, whether
 2 fraud, before or after a loss, the insured has wil-
 3 fully concealed or misrepresented any ma-
 4 terial fact or circumstance concerning this insurance or the
 5 subject thereof, or the interest of the insured therein, or in case
 6 of any fraud or false swearing by the insured relating thereto.
 7 Uninsurable This policy shall not cover accounts, bills,
 8 and currency, deeds, evidences of debt, money or
 9 excepted property. securities; nor, unless specifically named
 10 hereon in writing, bullion or manuscripts.
 11 Perils not This Company shall not be liable for loss by
 12 included. fire or other perils insured against in this
 13 policy caused, directly or indirectly, by: (a)
 14 enemy attack by armed forces, including action taken by mili-
 15 tary, naval or air forces in resisting an actual or an immediately
 16 impending enemy attack; (b) invasion; (c) insurrection; (d)
 17 rebellion; (e) revolution; (f) civil war; (g) usurped power; (h)
 18 order of any civil authority except acts of destruction at the time
 19 of and for the purpose of preventing the spread of fire, provided
 20 that such fire did not originate from any of the perils excluded
 21 by this policy; (i) neglect of the insured to use all reasonable
 22 means to save and preserve the property at and after a loss, or
 23 when the property is endangered by fire in neighboring prem-
 24 ises; (j) nor shall this Company be liable for loss by theft.
 25 Other Insurance. Other insurance may be prohibited or the
 26 amount of insurance may be limited by en-
 27 dorsement attached hereto.
 28 Conditions suspending or restricting insurance. Unless other-
 29 wise provided in writing added hereto this Company shall not
 30 be liable for loss occurring
 31 (a) while the hazard is increased by any means within the control
 32 or knowledge of the insured; or
 33 (b) while a described building, whether intended for occupancy
 34 by owner or tenant, is vacant or unoccupied beyond a period of
 35 sixty consecutive days; or
 36 (c) as a result of explosion or riot, unless fire ensue, and in
 37 that event for loss by fire only.
 38 Other perils Any other peril to be insured against or sub-
 39 or subjects. ject of insurance to be covered in this policy
 40 shall be by endorsement in writing hereon or
 41 added hereto.
 42 Added provisions. The extent of the application of insurance
 43 under this policy and of the contribution to
 44 be made by this Company in case of loss, and any other pro-
 45 vision or agreement not inconsistent with the provisions of this
 46 policy, may be provided for in writing added hereto, but no pro-
 47 vision may be waived except such as by the terms of this policy
 48 is subject to change.
 49 Waiver No permission affecting this insurance shall
 50 provisions. exist, or waiver of any provision be valid,
 51 unless granted herein or expressed in writing
 52 added hereto. No provision, stipulation or forfeiture shall be
 53 held to be waived by any requirement or proceeding on the part
 54 of this Company relating to appraisal or to any examination
 55 provided for herein.
 56 Cancellation This policy shall be cancelled at any time
 57 of policy. at the request of the insured, in which case
 58 this Company shall, upon demand and sur-
 59 render of this policy, refund the excess of paid premium above
 60 the customary short rates for the expired time. This poli-
 61 cy may be cancelled at any time by this Company by giving
 62 to the insured a five days' written notice of cancellation with
 63 or without tender of the excess of paid premium above the pro-
 64 rata premium for the expired time, which excess, if not ten-
 65 dered, shall be refunded on demand. Notice of cancellation shall
 66 state that said excess premium (if not tendered) will be re-
 67 funded on demand.
 68 Mortgage If loss hereunder is made payable, in whole
 69 interests and or in part, to a designated mortgagee not
 70 obligations. named herein as the insured, such interest in
 71 this policy may be cancelled by giving to such
 72 mortgagee a ten days' written notice of can-
 73 cellation.
 74 If the insured fails to render proof of loss such mortgagee, upon
 75 notice, shall render proof of loss in the form herein specified
 76 within sixty (60) days thereafter and shall be subject to the pro-
 77 visions hereof relating to appraisal and time of payment and of
 78 bringing suit. If this Company shall claim that no liability ex-
 79 isted as to the mortgagor or owner, it shall, to the extent of pay-
 80 ment of loss to the mortgagee, be subrogated to all the mort-
 81 gagee's rights of recovery, but without impairing mortgagee's
 82 right to sue; or it may pay off the mortgage debt and require
 83 an assignment thereof and of the mortgage. Other provisions

84 relating to the interests and obligations of such mortgagee may
 85 be added hereto by agreement in writing.
 86 Pro rata liability. This Company shall not be liable for a greater
 87 proportion of any loss than the amount
 88 hereby insured shall bear to the whole insurance covering the
 89 property against the peril involved, whether collectible or not.
 90 Requirements in The insured shall give immediate written
 91 case loss occurs. notice to this Company of any loss, protect-
 92 the property from further damage, forthwith
 93 separate the damaged and undamaged personal property, put
 94 it in the best possible order, furnish a complete inventory
 95 the destroyed, damaged and undamaged property, showing in-
 96 detail quantities, costs, actual cash value and amount of loss
 97 claimed; and within sixty days after the loss, unless such time
 98 is extended in writing by this Company, the insured shall render
 99 to this Company a proof of loss, signed and sworn to by the
 100 insured, stating the knowledge and belief of the insured as to
 101 the following: the time and origin of the loss, the interest of the
 102 insured and of all others in the property, the actual cash value of
 103 each item thereof and the amount of loss thereto, all encum-
 104 brances thereon, all other contracts of insurance, whether valid
 105 or not, covering any of said property, any changes in the title,
 106 use, occupation, location, possession or exposures of said prop-
 107 erty since the issuing of this policy, by whom and for what
 108 purpose any building herein described and the several parts
 109 thereof were occupied at the time of loss and whether or not it
 110 then stood on leased ground, and shall furnish a copy of all the
 111 descriptions and schedules in all policies and, if required, verified
 112 plans and specifications of any building, fixtures or machinery
 113 destroyed or damaged. The insured, as often as may be reason-
 114 ably required, shall exhibit to any person designated by this
 115 Company all that remains of any property herein described, and
 116 submit to examinations under oath by any person named by this
 117 Company, and subscribe the same; and, as often as may be
 118 reasonably required, shall produce for examination all books of
 119 account, bills, invoices and other vouchers, or certified copies
 120 thereof if originals be lost, at such reasonable time and place as
 121 may be designated by this Company or its representative, and
 122 shall permit extracts and copies thereof to be made.
 123 Appraisal. In case the insured and this Company shall
 124 fail to agree as to the actual cash value or
 125 the amount of loss, then, on the written demand of either, each
 126 shall select a competent and disinterested appraiser and notify
 127 the other of the appraiser selected within twenty days of such
 128 demand. The appraisers shall first select a competent and dis-
 129 interested umpire; and failing for fifteen days to agree upon
 130 such umpire, then, on request of the insured or this Company,
 131 such umpire shall be selected by a judge of a court of record in
 132 the state in which the property covered is located. The ap-
 133 praisers shall then appraise the loss, stating separately actual
 134 cash value and loss to each item; and, failing to agree, shall
 135 submit their differences, only, to the umpire. An award in writ-
 136 ing, so itemized, of any two when filed with this Company shall
 137 determine the amount of actual cash value and loss. Each
 138 appraiser shall be paid by the party selecting him and the ex-
 139 penses of appraisal and umpire shall be paid by the parties
 140 equally.
 141 Company's It shall be optional with this Company to
 142 options. take all, or any part, of the property at the
 143 agreed or appraised value, and also to re-
 144 pair, rebuild or replace the property destroyed or damaged with
 145 other of like kind and quality within a reasonable time, on giv-
 146 ing notice of its intention so to do within thirty days after the
 147 receipt of the proof of loss herein required.
 148 Abandonment. There can be no abandonment to this Com-
 149 pany of any property.
 150 When loss The amount of loss for which this Company
 151 payable. may be liable shall be payable sixty days
 152 after proof of loss, as herein provided, is
 153 received by this Company and ascertainment of the loss is made
 154 either by agreement between the insured and this Company ex-
 155 pressed in writing or by the filing with this Company of an
 156 award as herein provided.
 157 Suit. No suit or action on this policy for the recovery
 158 of any claim shall be sustainable in any
 159 court of law or equity unless all the requirements of this policy
 160 shall have been complied with, and unless commenced within
 161 twelve months next after inception of the loss.
 162 Subrogation. This Company may require from the insured
 163 an assignment of all right of recovery against
 164 any party for loss to the extent that payment therefor is made
 165 by this Company.

Plaintiff's Exhibit No. 1-D—(Continued)

Standard Forms Bureau Form 199-L (Jan. 1948)

ENDORSEMENT

Attached to and forming part of Policy No. 6857 of the Home Insurance Co.

Agency at Phoenix, Arizona, Dated Oct. 31, 1946.

Issued to Eloy Gin Corp.

Property Insured: [Not printed, no information shown].

Commencement of Policy, 8/1/45. Expiration of Policy, 8/1/46.

Effective Date of This Endorsement, 10/31/46.

Additional Premium, \$102.72.

In consideration of an additional premium of \$102.72, it is hereby understood and agreed that loss in the amount of \$6,990.30, is hereby reinstated.

No other changes.

GUARDIAN INSURANCE AGENCY.

Agent.

Standard Forms Bureau Form 199-L (Jan. 1948)

ENDORSEMENT

Attached to and forming part of Policy No. 6857 of the Home Insurance Co.

Agency at Phoenix, Arizona, Dated 1/1/46.

Issued to Eloy Gin Corporation.

Property Insured: [Not printed, no information shown].

Commencement of Policy, 8/1/45. Expiration of Policy, 8/1/46.

Effective Date of This Endorsement, 1/1/46.

In consideration of the deposit premium at which the above-mentioned policy is written, the limit of liability at Location No. 1 is amended as follows:

Location	Old Limit	New Limit
South of Eloy, Arizona.....	\$150,000.00	\$175,000.00

No other change.

Effective January 1, 1946.

GUARDIAN INSURANCE AGENCY.

Agent.

Plaintiff's Exhibit No. 1-D—(Continued)

Standard Forms Bureau Form 199-L (Jan. 1948)

ENDORSEMENT

Attached to and forming part of Policy No. 6857 of the Home Insurance Co.

Agency at Phoenix, Arizona, Dated 11/1/45.

Issued to Eloy Gin Corporation.

Property Insured: [Not printed, no information shown].

Commencement of Policy, 8/1/45. Expiration of Policy, 8/1/46.

Effective Date of This Endorsement, 11/1/45.

In consideration of the deposit premium at which the above-mentioned policy is written, the limit of liability at Location No. 1 is amended as follows:

Location	Old Limit	New Limit
South of Eloy, Arizona.....	\$125,000.00	\$150,000.00
No other change.		
Effective 1, 1945.		

GUARDIAN INSURANCE AGENCY.

Agent.

Standard Forms Bureau Form 199-L (Jan. 1948)

ENDORSEMENT

Attached to and forming part of Policy No. 6857 of the Home Insurance Co.

Agency at Phoenix, Arizona, Dated November 1, 1945.

Issued to Eloy Gin Corporation.

Property Insured: [Not printed, no information shown].

Commencement of Policy, 8/1/45. Expiration of Policy, 8/1/46.

Effective Date of This Endorsement, 11/1/45.

In consideration of the deposit premium at which the above-mentioned policy is written, the limit of liability at Location No. 1 is amended as follows:

Location	Old Limit	New Limit
South of Eloy, Arizona.....	\$100,000.00	\$125,000.00
No other change.		

Effective: November 1, 1945.

GUARDIAN INSURANCE AGENCY.

Agent.

Plaintiff's Exhibit No. 1-D—(Continued)

Standard Forms Bureau Form 199-L (Jan. 1948)

ENDORSEMENT

Attached to and forming part of Policy No. 6857 of the Home Insurance Co.

Agency at Phoenix, Arizona, Dated August 1, 1945.

Issued to Eloy Gin Corporation.

Property Insured: [Not printed, no information shown].

Commencement of Policy, 8/1/45. Expiration of Policy, 8/1/46.

Effective Date of This Endorsement, 8/1/45.

Amount Insured, 100% of limits.

Old Rate, Fire 2.888. New Rate, Fire 2.714.

Return Premium, \$52.20.

In consideration of a return premium of \$52.20, (Fire) it is hereby understood and agreed that the fire rate as originally charged is reduced from 2.888 to 2.714 effective date of issue. In consideration of above, the deposit premium as originally charged is amended to read \$834.60.

Effective: August 1, 1945.

No other change.

GUARDIAN INSURANCE AGENCY.

Agent.

Provisional Reporting Policy Form No. 1. (Monthly Average)

This Policy Insures
Eloy Gin Corporation

Loss, if any, to be adjusted with the Insured named herein and payable to Insured.

1. On merchandise of every description (except as hereinafter excluded) consisting principally of Cotton by-products, materials and supplies manufactured or in process of manufacture, and on materials for manufacturing same, including packages, labels, cases, boxes and all wrapping and packing materials, all being the property of insured or sold but not delivered or removed; and (PROVIDED the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor), this insurance shall also cover merchandise held in trust, or on commission or consignment, or left for storage or repairs, but loss thereon shall be adjusted with and payable to the insured named in this policy; all while contained in any building, shed or structure, or on the premises, and in or on cars and vehicles while within 300 feet of said premises, and also while in, on or under sidewalks, platforms, alleyways and open space, provided such property be

Plaintiff's Exhibit No. 1-D—(Continued)

located within 50 feet thereof, within the limits of the State of Arizona.

2. "Provisional Amount Clause." The amount of insurance provided for hereunder is provisional and is the amount on which the deposit premium is based, it being the intent of this insurance to insure hereunder the actual cash value of the property described herein subject to the limits of liability and provisions for other insurance hereinafter provided.

3. "Limit of Liability." This policy being for the provisional amount of \$30,000.00, being 100% of the total contributing insurance, liability of this company is limited to the same percentage of any loss and in no event to exceed the same percentage of each of the following limits, but no insurance attaches under any one or more of the following limits unless a definite amount is specified as a limit and inserted in the blank immediately opposite the location item:

Item Number	Limit of Liability for all Contributing Insurance	Location, St. No. and City
1.	\$100,000.00	at South of Eloy, Arizona

[Items 2 through 9: blank.]

10. \$ 5,000.00 at any other location within the above-named geographical limits where the insured may have property as above described, subject to the conditions of the "Exclusion Clause," Paragraph No. 4, and of the "Value Reporting Clause," Paragraph No. 8.

4. "Exclusion Clause." This policy does not cover

(A) Motor vehicles, property in transit, property at or in fairs or expositions, or growing crops;

(B) At any location, which was not included in the last statement of values received by this company prior to loss, provided the insured had property as herein described at risk at such location as of the date for which such statement was made as provided in the "Value Reporting Clause," Paragraph 8.

5. "Contributing Insurance Clause." Permission is granted for other insurance written upon the same plan, terms, conditions, and provisions as those contained in the form attached to this policy, i.e., insurance written under this provisional reporting form. The insurance under this policy in accordance with its printed conditions or riders, shall contribute only with other insurance as herein above defined, against any peril insured by this policy.

6. "Specific Insurance." Insurance other than described in the "Contributing Insurance Clause," Paragraph 5, shall be known as specific insurance for which permission is hereby granted, however, in the computation of the final premium it shall not

Plaintiff's Exhibit No. 1-D—(Continued)

be permissible to deduct or credit such specific insurance against the values shown in the monthly reports except when

- (A) It has been necessary to procure such insurance to protect values in excess of the limits of liability of this policy, or
- (B) It has been disclosed by written endorsement hereon showing location, expiration and amount.

7. "Excess Clause." This policy does not attach to or become insurance against any peril upon property herein described which at the time of any loss is insured by "Specific Insurance" as defined in Paragraph 6, until the liability of such "Specific Insurance" has been exhausted, and then shall cover only such loss or damage as may exceed the amount due from such "Specific Insurance" (including the amount otherwise due from invalid insurance had same been valid, and including also the amount due from any uncollectible insurance) after application of any contribution, coinsurance, average, distribution, or other similar clauses contained in policies of such "Specific Insurance" affecting the amount due thereunder, not, however, exceeding limits as set forth herein.

The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. 6857 of the Home Insurance Company. Agency at Phoenix, Arizona, Dated August 1, 1945.

GUARDIAN INSURANCE AGENCY.

Agent.

8. "Value Reporting Clause."

- (A) It is a condition of this policy that the insured shall report to this company on the last day of each month of the policy term the exact location of all property covered hereunder, the actual cash value of such property at each location and the amount of specific insurance in force at each location, all as of the last day of that month. However, a grace period of thirty (30) days shall be allowed for compilation and submission of such reports to this company.
- (B) If at the time of any loss, the insured has failed to file with this company, reports of values as above required, this policy, subject otherwise to all its terms and conditions, shall cover only at the locations and for not more than the amounts included in the last report of values filed prior to the loss; and further, if such delinquent report is the first report of values as required to be filed, this policy shall cover only at the locations specifically named herein.

Plaintiff's Exhibit No. 1-D—(Continued)

9. "Full Reporting Clause." Liability under this policy shall not in any case exceed that proportion of any loss hereunder (meaning the loss at the location involved after deducting the liability of specific insurance, if any) which the last value reported to this company prior to the loss, less the amount of reported specific insurance, if any, at the location where the loss occurs, bears to the actual cash value of the property above described, less the amount of specific insurance, if any, actually in force at that location at the time of such report. Liability for loss hereunder occurring at any new location where, since filing the last report, the insured may have property as above described (except as provided in "Value Reporting Clause," Paragraph 8) shall be apportioned in a like manner, except that the proportion used shall be the relation that the values at all locations reported prior to the loss, less the amount of reported specific insurance, if any, bear to the actual cash value of the property above described at all locations, less the amount of specific insurance, if any, actually in force at the time of such report. However, this company shall not be liable hereunder for a greater proportion of such loss at any location than the limit of liability herein specified for that location bears to the actual cash value of the property described at that location at the time of loss.

10. "Premium Adjustment Clause." The premium named in the policy is provisional only. The actual premium consideration for the liability assumed hereunder shall be determined, at the expiration of this policy, by application of the following formula:

After deducting the amount of specific insurance, if any, (not exceeding, however, the amount of value reported) at each location, an average of the total remaining values reported at each location (but not in excess of the limit of liability established herein) shall be made, and if the premium on such average values at the rate applying at each location herein provided exceeds the provisional premium, the insured shall pay to the insurer an additional premium for such excess; and, if such premium is less than the provisional premium, the insurer shall refund to the insured any excess paid. If this policy is written for a term of more than one year, an adjustment of both the premium earned and the amount of deposit premium shall be made annually as herein provided.

11. "Retained Premium Clause." It is a further condition of this policy, anything to the contrary notwithstanding, that the final adjusted premium as provided in the "Premium Adjustment Clause," Paragraph 10, shall in no event be less than \$100.00 under this policy.

12. "Premium Payment in Case of Loss Clause." It is a condition of this policy that, in case of loss occurring hereunder, the premium applicable to the amount of loss payment shall be earned for the term of the contract; therefore, the insured shall pay this company an additional premium at pro rata of the rate applicable

Plaintiff's Exhibit No. 1-D—(Continued)

thereto for the unexpired term of this policy on the amount of the loss paid, and said premium may be deducted from the payment of said loss.

13. "Reinstatement of Loss Clause." It is a condition of this policy that, in case of loss occurring hereunder, the amount of such loss shall be automatically reinstated after its occurrence and this insurance shall then cover for the amount provided for hereunder.

14. "Verification of Values." This Company or its duly appointed representative, shall be permitted at all reasonable times during the term of this policy, or within a year after its expiration, to inspect the property covered hereunder and to examine the insured's books, records and such policies as relate to any property covered hereunder. This inspection and/or examination shall not waive or in any manner affect any of the terms or conditions of this policy.

15. This policy attaches and expires at any location at noon, meaning thereby noon standard time at such location.

16. "Subrogation Waiver." It is understood and agreed that any release from liability in a written contract entered into, prior to loss hereunder, by the insured with any person, firm, corporation or municipality, shall in no way affect this policy or the rights of the insured to recover hereunder.

17. "No Control Clause." This policy shall not be affected by failure of the insured to comply with any of the warranties or conditions endorsed hereon, in any portion of the premises over which the insured has no control.

18. "Permits." Permission granted to make alterations or repairs to the above described building(s) without limit of time and to build additions, and if in contact therewith, this policy shall cover in same under its respective items; permission granted to cease operations or shut down for not to exceed sixty (60) days at any one time, subject to the conditions of the watchman clause, if any, made a part of this policy; permission also granted to work at any and all times, and for such use of the premises as is usual and incidental in the business, as conducted therein, and to keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require.

19. "Lightning Clause." (This Clause Void as to Cyclone, Tornado or Windstorm Insurance.) This policy shall cover any direct loss or damage by lightning (meaning thereby the commonly accepted use of the term "lightning" and no case to include loss or damage by cyclone, tornado or windstorm) not exceeding the sum insured nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy. Provided, however, that the liability of this company for any direct loss or damage by lightning shall not exceed the liability that would have been incurred hereunder if said loss or dam-

Plaintiff's Exhibit No. 1-D—(Continued)

age was caused by fire, whether or not other insurance on the property be against direct loss by lightning.

20. "Electrical Exemption Clause." If dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this insurance shall not cover any immediate loss or damage to dynamos, exciters, lamps, motors, switches, or any other apparatus for generating, utilizing, testing, regulating or distributing electricity, caused directly by electric currents therein, whether artificial or natural, including lightning.

Standard Forms Bureau Form 202 P. R. (July 1944) N.Y. 1943

Provisional Reporting Form—Extended Coverage Endorsement
(Perils of Windstorm, Hail, Explosion, Riot, Riot Attending a
Strike, Civil Commotion, Aircraft, Vehicles, Smoke,
Except as Hereinafter Provided)

Rate for extended coverage .068.

In consideration of \$20.40 Incl. provisional premium, and subject to provisions and stipulations (hereinafter referred to as "provisions") herein and in the policy to which this endorsement is attached, including riders and endorsements thereon, the coverage of this policy is extended to include direct loss by Windstorm, Hail, Explosion, Riot, Riot Attending a Strike, Civil Commotion, Aircraft, Vehicles, and Smoke.

This endorsement does not increase the amount or amounts of insurance provided in the policy to which it is attached.

If this policy covers on two or more items, the provisions of this endorsement shall apply to each item separately.

Substitution of Terms: In the application of the provisions of this policy, including riders and endorsements (but not this endorsement), to the perils covered by this Extended Coverage Endorsement, wherever the word "fire" appears there shall be substituted therefor the peril involved or the loss caused thereby, as the case requires.

Fall of Building Clause: The Fall of Building Clause, if any, in the policy to which this endorsement is attached shall not apply when the fall is caused by any of the perils included in this endorsement.

Apportionment Clause: This Company shall not be liable for a greater proportion of any loss from any peril or perils included in this endorsement than the proportion this Company would assume under the provisions of the fire policy to which this endorsement is attached had the loss been caused by fire.

Glass Clause: It is expressly stipulated as applicable to all perils included in this endorsement that only such proportion of the insurance under this policy on any building covers on plate, stained,

Plaintiff's Exhibit No. 1-D—(Continued)

leaded or cathedral glass therein as the value of such glass which is damaged bears to the total value of said building.

War Risk Exclusion Clause: This Company shall not be liable for loss by any of the perils insured against in this endorsement caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power.

Waiver of Policy Provisions: A claim for loss from perils included in this endorsement shall not be barred because building is not on ground owned by the Insured in fee simple, factory operations have ceased, of change of occupancy, of existence of encumbrance, of factory operations at night, nor because of vacancy or unoccupancy.

Attached to and forming part of Policy No. 6857 of the Home Insurance Company of New York issued at its Phoenix, Arizona, Agency. Dated August 1, 1945.

GUARDIAN INSURANCE AGENCY.

Agent.

Caution: When This Endorsement Is Attached to One Fire Policy, the Insured Should Secure Like Coverage on All Fire Policies Covering the Same Property.

Provisions Referred to in and Made Part of This Form
(No. 202 P.R.)

Provisions Applicable Only to Windstorm and Hail: This Company shall not be liable for loss caused directly or indirectly by (a) frost or cold weather or (b) snowstorm, tidal wave, high water or overflow, whether driven by wind or not.

This Company shall not be liable for loss to the interior of the building or the insured property therein caused, (a) by rain, snow, sand or dust, whether driven by wind or not, unless the building insured or containing the property insured shall first sustain an actual loss to roof or walls by the direct force of wind or hail and then shall be liable for loss to the interior of the building or the insured property therein as may be caused by rain, snow, sand or dust entering the building through openings in the roof or walls made by direct action of wind or hail or (b) by water from sprinkler equipment or other piping, unless such equipment or piping be damaged as a direct result of wind or hail.

Unless liability therefor is assumed in the form attached to this policy, or by endorsement hereon, this Company shall not be liable for damage to the following property: (a) grain, hay, straw or other crops outside of buildings or (b) windmills, windpumps, or their towers, cloth awnings, signs, metal smokestacks, temporary or board roof additions, or (c) buildings (or their contents) in

Plaintiff's Exhibit No. 1-D—(Continued)

process of construction or reconstruction unless entirely enclosed and under roof with all outside doors and windows permanently in place.

Provisions Applicable Only to Explosion: This Company shall not be liable for loss by explosion originating within steam boilers, steam pipes, steam turbines, steam engines, fly-wheels, located in the building(s) insured or in building(s) containing the property insured.

Any other explosion clause made a part of this policy is superseded by this endorsement.

Provisions Applicable Only to Riot, Riot Attending a Strike and Civil Commotion: Loss by riot, riot attending a strike or civil commotion shall include direct loss by acts of striking employees of the owner or tenant(s) of the described building(s) while occupied by said striking employees and shall also include direct loss from pillage and looting occurring during and at the immediate place of a riot, riot attending a strike or civil commotion. This Company shall not be liable, however, for loss resulting from damage to or destruction of the described property owing to change in temperature or interruption of operations resulting from riot or strike or occupancy by striking employees or civil commotion, whether or not such loss, due to change in temperature or interruption of operations, is covered by this policy as to other perils.

Provisions Applicable Only to Loss by Aircraft and Vehicles: Loss by "aircraft" includes direct loss by objects falling therefrom. The term "vehicles," as used in this endorsement, means vehicles running on land or tracks. This Company shall not be liable, however, for loss (a) by any vehicle owned or operated by the Insured or by any tenant of the described premises; (b) to aircraft or vehicles including contents other than stocks of aircraft or vehicles in process of manufacture or for sale; (c) to fences, driveways, sidewalks or lawns.

Provisions Applicable to Smoke: The term "smoke" as used in this endorsement means only smoke due to a sudden, unusual and faulty operation of any heating or cooking unit, only when such unit is connected to a chimney by a smoke pipe, and while in or on the premises described in this policy, excluding, however, smoke from fireplaces or industrial apparatus.

Provisions Applicable Only When This Endorsement Is Attached to a Policy Covering Rents and/or Accrued Warehouse Charges: When this endorsement is attached to a policy covering rents and/or accrued warehouse charges, the term "direct," as applied to loss, means loss, as limited and conditioned in such policy, resulting from direct loss to described property from perils **insured against**; and, while the business of the owner or tenant(s) of the described building(s) is interrupted by a strike at the described location, this Company shall not be liable for any loss owing to interference by any person(s) with rebuilding, repairing or replacing the property damaged or destroyed or with the resumption or continuation of business.

Plaintiff's Exhibit No. 1-D—(Continued)

Standard Forms Bureau Form 199-L (Jan. 1948)

ENDORSEMENT

Attached to and forming part of Policy No. 6857 of the Home Insurance Co.

Agency at Phoenix, Arizona, Dated Oct. 22, 1945.

Issued to Eloy Gin Corporation.

Property Insured: [Not printed, no information shown].

Commencement of Policy, 8/1/45. Expiration of Policy, 8/1/46.

Effective Date of This Endorsement, 8/1/45.

It is hereby understood and agreed that vacancy permit under Paragraph 18 "Permits" is amended to read as follows:

To be and remain vacant and/or unoccupied and to shut down and/or cease operations for a period not to exceed ten (10) months at any one time"

instead of as written.

Effective: August 1, 1945.

No other change.

GUARDIAN INSURANCE AGENCY.

Agent.

Standard Forms Bureau Form 199-L (Jan. 1948)

ENDORSEMENT

Attached to and forming part of Policy No. 6857 of the Home Insurance Co.

Agency at Phoenix, Arizona, Dated Oct. 22, 1945.

Issued to Eloy Gin Corporation.

Property Insured: [Not printed, no information shown].

Commencement of Policy, 8/1/45. Expiration of Policy, 8/1/46.

Effective Date of This Endorsement, 100% of Limits.

In consideration of the rate and premium at which this policy is written, it is understood and agreed that Item (A) of Paragraph 8 "Value Reporting Clause" is amended to read as follows:

"It is understood and agreed that the value of such property to be reported monthly shall be the weekly average value of such property for the preceding month based upon the value of each Saturday of such month in each location"

instead of as originally written.

Effective August 1, 1945.

No other change.

GUARDIAN INSURANCE AGENCY.

Agent.

Plaintiff's Exhibit No. 1-D—(Continued)

Copy

Form 300

11½M—7-44

Buyers Transit Form

Coverage:

1. This insurance is continuous until cancelled as provided herein and covers, except as otherwise provided in this policy, the risks of loss or damage to all cotton in bales of United States and Mexican growth while in the United States and in Canada and while owned by the Assured or while legally at the risk of the Assured under contract of purchase or sale, and not otherwise, by fire, lightning, tidal waves, overflowing rivers, collision, derailment, explosion, overturning of motor trucks, trailers or drays, collapse of highway bridges, collapse or subsidence of steamship wharves; also influx of rising water occasioned by torrential rains (excluding all cotton stored in the open).

2. It is agreed that the amount of this insurance at any one location shall not exceed the actual cash value of the cotton covered hereunder at such location as defined in Section 3 below, or in any endorsement in lieu thereof that may be attached hereto.

3. (a) The actual cash value provided for in this policy shall be (except as provided for in paragraph (c) of this section) the market value at the place of loss, which shall be determined by using, (1) the opening quotation of the first "futures" market for the next active trading month following

Plaintiff's Exhibit No. 1-D—(Continued)

the time the loss or damage commences and, (2) the prevailing "basis" as of the date the loss commences. (*All words and terms in the preceding sentence are to be taken in the sense they are understood and used in the cotton trade.*) It is specifically provided, however, that if for ten (10) consecutive days from the date loss or damage commences the "futures" market be closed, then the value shall be the actual market value of the cotton at the time and place of loss.

(b) It is understood and agreed, however, that this Company shall always have the right, in lieu of cash payment, to replace any cotton with other cotton equivalent in value and as nearly as practicable of the same grade and staple.

(c) If a specific valuation has been declared to this Company by mail or telegraphic notice prior to loss, as to cotton which has been sold or is under contract of sale and moving by land carrier to consignee, the value shall be such declared value. If certificates, as provided in Section 4, have been mailed to this Company prior to loss, the value shall be such certificated value.

4. Certificates on forms furnished by this Company may be issued by the Assured covering cotton sold or under contract of sale by the Assured but only after it has been delivered to a land carrier for transportation to purchaser or his order or for his account, provided a copy thereof shall be mailed to this Company on the day of issue. Each certifi-

Plaintiff's Exhibit No. 1-D—(Continued)

cate shall with respect to the cotton specified therein constitute the sole contract between the holder of same and this Company.

5. In respect only to cotton sold and shipped to purchasers at the risk of the Assured by all rail conveyances, for which certificates have been issued or which has been specially declared to this Company, this policy covers hazards, in addition to those specified in Section 1 above, as follows:

Loss or damage caused by cyclone, tornado, rising waters, earthquake, landslide, collapse of bridges or collapse and/or subsidence of docks, piers and/or bulkheads, landing sheds, depots, stations and/or platforms.

6. No other insurance permitted without the written consent of this Company endorsed hereon.

Payments or Advances in Case of Loss:

7. Warranted by the Assured: to give immediate notice to this Company of any loss or damage; that this Company shall have the right to investigate the circumstances attending the same, the condition of the Assured's records, the amount of loss and any other matter pertaining to the Assured's transactions in cotton, and to handle and dispose of the salvage, if any, and collect premiums due and to become due under this policy, without admitting liability and without waiving the right to deny liability on account of any breach of warranty or

Plaintiff's Exhibit No. 1-D—(Continued)

condition of this policy or any right of this Company under this policy. All claims shall be payable after the expiration of fifteen (15) days from receipt of such notice, provided satisfactory proofs have been filed.

8. After presentation of proofs of loss or damage to cotton described in Section 1 of this form (and not excluded hereunder) while in possession of any carrier or other bailee, this Company, provided the provisions of this policy have been complied with, will advance as a loan to the Assured the amount of such loss or damage, repayable only to the extent of any recovery from such carrier or bailee.

9. Payments or advances, in case of loss or damage to cotton, shall be made to banks or other persons having made advances against such cotton, as their interests may appear, or, at the option of this Company, to such banks or other persons and the Assured jointly, provided this Company receives written notice of such interest within ten (10) days after such loss or damage.

10. The Assured represents and warrants that all Federal and all other taxes and assessments on cotton covered under this policy have either been paid or this Company will be held harmless, in the event of loss or damage under this policy, as to such taxes and/or assessments.

Plaintiff's Exhibit No. 1-D—(Continued)

Reports and Premiums:

11. (a) It is warranted that on the day this policy becomes effective the Assured will report to this Company all cotton owned by the Assured and all cotton legally at the risk of the Assured as purchaser under contracts of purchase; and thereafter will report each day all daily purchases, sales and shipments of cotton, with values of such sales and shipments, including all cotton under compress or warehouse receipts, whether *insured* or not, or under bills of lading and contracts of purchase; and pay to this Company premiums thereon at rates and in accordance with the terms promulgated by this Company, which may be altered on thirty (30) days' notice to the Assured. However, this Company reserves the right, upon five (5) days' notice to the Assured, to increase rates at any location where recommendations made by this Company for the protection of cotton are not complied with.

(b) Upon issuance of this policy a minimum premium of \$50.00 shall be earned and charged against the Assured. Such minimum premium shall be payable on demand and in the event of termination of this policy, no part of such minimum premium shall be returned or credited as a return premium. The Assured shall not be liable for additional premiums under this policy until the total premiums shall exceed the minimum premium hereunder.

(c) Additional premiums for each month shall

Plaintiff's Exhibit No. 1-D—(Continued)

be payable on or before the 15th day of the succeeding month.

(d) In the event of loss the Assured shall pay the premium on the ascertained market value of cotton on which any loss may be paid, just as though such cotton had been sold.

(e) If this policy is terminated, the Assured shall pay premium on the ascertained market value of all cotton on hand, just as though such cotton had been sold.

Records:

12. Warranted by the Assured: (a) that he will make and at all times preserve an accurate record of all purchases, sales, bailments and shipments, showing the weight, classification and identity of each bale, its location and change of location, and the dates of all his transactions in cotton, which record shall be open at all times to the inspection of any authorized representative of this Company upon request; (b) that in the event of loss or damage hereunder, he will deliver such records to this Company, and in the event of his failure so to do for any cause, this policy shall be null and void as to such loss.

Special Provisions:

13. Unless otherwise provided by this Company in writing, this insurance does not cover the following:

Plaintiff's Exhibit No. 1-D—(Continued)

(a) Cotton while waterborne;

(b) Cotton, prior to actual delivery to the Assured, that has not been specifically identified in writing by marks and numbers in possession of the Assured or mailed to the Assured prior to loss;

(c) Cotton for which the Assured is liable as warehouseman or other bailee, or for which the Assured is liable to any person, firm or corporation. This insurance shall never inure to the benefit of any carrier, bailee or any person, firm or corporation other than the Assured, except that payments may be made as provided for in Section 9 above:

(d) Cotton for which any carrier or other bailee is liable, or cotton under bills of lading or storage receipts that give the carrier, warehouseman or other bailee the benefit of any insurance thereon, or cotton on which any carrier or other bailee has insurance which would attach if this policy had not been issued, or insurance which would, under any circumstances, inure to the benefit of the Assured hereunder.

(e) Cotton for which any carrier, bailee or other person has been or shall be released from any liability;

(f) Cotton linters and hull fibers;

(g) Cotton in course of delivery to purchaser by land carriers if delivery is stopped or delayed by order of the Assured or purchaser, unless declared to this Company for additional premium prior to known or supposed loss.

Plaintiff's Exhibit No. 1-D—(Continued)

Waivers:

14. Any waiver by this Company of any breach of any condition or warranty of this policy shall not be considered a waiver of any subsequent breach of any condition or warranty of this policy.

Cancellations:

15. This policy shall continue in force from year to year, but may be cancelled at any time at the request of the Assured. This Company reserves the right to terminate, on five (5) days' written notice to the Assured, any or all liability at any or all locations.

When cancellation, by the Assured or by this Company, becomes effective, all risk hereunder shall cease and terminate except as to cotton actually delivered to a carrier for shipment to purchasers at Assured's risk prior to time cancellation became effective.

Attached to and forming part of Policy No. OC-58587 of the National Fire Insurance Company of Hartford, Connecticut.

F. M. BUTT & COMPANY,
Agent.

(I) (We) hereby accept this policy and consent to all of its terms and conditions.

.....,
Assured.

Date August 1, 1944.

Plaintiff's Exhibit No. 1-D—(Continued)

See reverse side hereof for other conditions which are not effective unless specifically agreed to in writing by this Company through G. C. Ferrell, Special Manager, or his successors in office.

The following conditions are not a part of this policy unless accepted in writing by this Company through G. C. Ferrell, Special Manager, or his successors in office. Upon such acceptance any other provisions of this policy that are in conflict shall be void.

A. Fifth Market Day Loss Clause:

[Stamped]: The provisions of this clause are accepted and made a part of this policy from date of issue.

/s/ G. C. FERRELL,
Special Manager.

W.

.....,
Agent.

It is understood and agreed that paragraph (a) of Section 3, on the face hereof, is cancelled and the following is substituted therefor:

“The actual cash value provided for in this policy shall be (except as provided for in paragraph (c), of Section 3, of Form 300, attached hereto) the market value at the place of loss, which shall be determined by using, (1) the closing quotation of the “futures” market for the next active trading month on the fifth

Plaintiff's Exhibit No. 1-D—(Continued)

market day following the date on which the loss or damage commences and, (2) the prevailing "basis" as of the date the loss commences. (*All words and terms in the preceding sentence are to be taken in the sense they are understood and used in the cotton trade.*) It is specifically provided, however, if for ten (10) consecutive days from the date loss or damage commences the "futures" market be closed, then the value shall be the actual market value of the cotton at the time and place of loss."

B. Consignment Clause:

[Stamped]: The provisions of this clause are accepted and made a part of this policy from date of issue.

/s/ G. C. FERRELL,
Special Manager.

W.

.....,
Agent.

1. This policy is hereby extended to cover all cotton in bales consigned to the Assured for sale, except as hereinafter provided.

2. The liability as hereby extended shall attach only to cotton in the custody of rail carriers and/or compresses or warehouses issuing negotiable receipts, as follows:

(a) Upon issuance of bill of lading to the Assured, or order notify the Assured;

Plaintiff's Exhibit No. 1-D—(Continued)

(b) Cotton delivered direct to compress or warehouse, for which storage receipts are to be issued direct to the Assured, upon acceptance of such cotton by the compress or warehouse;

(c) Cotton for which storage receipts are issued in the name of someone other than the Assured, only upon assignment or delivery of such receipts to the Assured prior to loss;

(d) Cotton for which storage receipts are held by the owners of the cotton, when written evidence is delivered to the Assured or placed in the mail to the Assured prior to loss, granting him the power of disposing of such cotton, and only when such written evidence contains the marks and numbers of each bale.

3. This insurance does not cover any cotton on which the owner has other insurance which would attach if this insurance had not been issued, except on the value, if any, in excess of such other insurance.

4. This insurance does not cover any interest of, and shall not inure to the benefit of, any person, firm or corporation making any consignment of cotton to the Assured hereunder, nor shall any such consignor have any cause of action against this Company under this policy; but in event of a loss under this policy, any money found to be due hereunder shall be payable to Eugene B. Smith & Company only, whose receipt for such payment shall constitute a release in full of any and all

Plaintiff's Exhibit No. 1-D—(Continued)

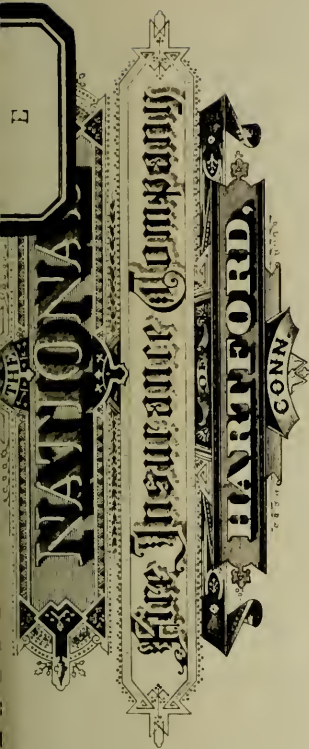
liability on the part of this Company to the Assured or any other person, firm or corporation.

5. In consideration of which the Assured agrees to keep a separate register or record of all such consigned cotton, and to report the same hereunder daily (Sundays and holidays excepted) on separate daily report blanks and to pay premium thereon at the same rates as for cotton purchased by the Assured. The Assured further agrees to include in such reports all cotton so consigned to them or to furnish this Company with written notice naming the parties, whose cotton—so consigned to the Assured—is to be excluded.

C. Theft Clause:

In consideration of additional premium at rates to be named, this insurance is extended to cover the risk of theft and/or non-delivery of an entire bale or entire bales, this extension of cover attaching from the time cotton is actually delivered into the custody of a motor truck carrier and receipt therefor given by such carrier and covering until motor carrier's contract of carriage has ceased. It is expressly understood, however, that this insurance as hereby extended does not cover any theft or non-delivery by the Assured, shipper, or consignee, or any of their employees; or nondelivery due to any action of the Civil Authorities.

Admitted October 27, 1950.



In Consideration of the stipulations and conditions herein or added hereto,
 which are made a part of this policy, and of the premiums provided
 DOES INSURE EUGENE B. SMITH & COMPANY
 and legal representatives,

FROM AUGUST 1, 1944 TO UNTIL CANCELLED
 against direct loss resulting from any of the Perils (listed below) WHICH HAVE A PREMIUM INSERTED OPPOSITE THERETO
 (Column 6) and only on the property described and located as provided hereon.

1 COVERAGE	2 PERILS	3 COINSURANCE APPLICABLE	4 TOTAL INSURANCE	5 TERM RATE	6 PREMIUM
F	FIRE and Lightning	AS PER FORM 300 ATTACHED.	\$ OPEN (AS PER FORM)	AS AGREED	AS AGREED TO BE PAID
E	EXTENDED COVERAGE—	Windstorm, Hurricane, Hail, Explosion, Riot, Civil Commotion, Smoke, Aircraft, and Land Vehicles.		NIL	NIL
X	EXPLOSION		\$	NIL	NIL
R	RENTS or Rental Value (Not to exceed)		\$	NIL	NIL
TOTAL PREMIUM \$ TO BE PAID					

ITEM	AMOUNT OF	DESCRIPTION OF PROPERTY	RATE
SPECIMEN			

Plaintiff's Exhibit No. 1-E—(Continued)

300-CC

ENDORSEMENTS

Special Rider No. 4

Sales to Federal Surplus Commodities Corporation

It is hereby understood and agreed that in respect to cotton sold to the Federal Surplus Commodities Corporation, in case of loss or damage, the amount applicable under this policy from the time of sale until the date title passes to the Federal Surplus Commodities Corporation shall be either the market value that is provided in the Buyers Transit form that is a part of this policy or the invoice value at which the Federal Surplus Commodities Corporation has purchased the cotton from the Assured, whichever may be the higher.

It is warranted by the Assured that they will report all such cotton separately from all other cotton covered under this policy and pay premium thereon at rates and under conditions promulgated by this Company.

This rider may be cancelled by the Assured at any time, and by this Company on five (5) days' written or telegraphic notice to the Assured.

Attached to and forming part of Policy No. OC58587 of the National Fire Insurance Company.

F. M. BUTT & COMPANY,
Agent.

Plaintiff's Exhibit No. 1-E—(Continued)

Special Rider No. 3

Export Differential—Cotton Sales for
Export Program

1—It is understood and agreed that on shipments of cotton to foreign destinations, other than Mexico, which are eligible for the differential under the United States Government "Cotton Sales for Export Program," and which have been delivered to land carriers for shipment to final destination against a definite sale and/or freight contract and declared to this Company in accordance with Sections 3-(c) and 4 of the Buyers Transit form attached to this policy, it agreed, that in event of loss covered by the terms of this policy, and prior to:

- (a) arrival at destination in Canada; or
- (b) being laden on board ocean steamer for shipment to foreign destinations other than Canada.

2—This Company, in addition to paying the loss due under certificates or declared amounts, will pay the shipper so much of the differential as becomes uncollectible because of said loss.

3—In consideration hereof the Assured warrants that the amounts declared shall be the invoice values and charges plus 10 per cent, and the Assured further agrees to pay additional premium at the rate of one cent (1c) per One Hundred (\$100.) Dollars of such values.

Plaintiff's Exhibit No. 1-E—(Continued)

Attached to and forming part of Policy No. OC-58587 of the National Fire Insurance Company.

F. M. BUTT & COMPANY,
Agent.

Special Rider No. 2

This endorsement is attached to and forms part of Policy No. OC58587 of the National Fire Insurance Company, issued in the name of Eugene B. Smith & Company.

(a) It Is Hereby Understood and Agreed that on "Shippers Order" cotton insured hereunder this policy shall not be vitiated by the agreement of the Assured with the Cotton Concentration Company, Inc., Galveston, Texas, and the undermentioned carriers.

(b) In consideration of this agreement, the Assured undertake and agree to enter all such cotton on daily reports and pay premium thereon at agreed rates as of the date of delivery on the Cotton Concentration Company, Inc., Galveston, Texas, without regard to outstanding bills of lading.

(c) Limit of liability under this policy for loss by any one casualty prior to shipment to final destination and prior to cotton having passed beyond control of the Assured is limited to Open.

(d) This policy and endorsement will cover continuously until cancelled in accordance with its terms and conditions.

Plaintiff's Exhibit No. 1-E—(Continued)

It is further understood and agreed that from and after the date this policy is terminated in accordance with its terms and conditions all liability hereunder shall cease and terminate in respect to all cotton at risk of the Assured (except cotton in the hands of carriers in due course of transit to final destination) irrespective of whether or not any cotton at risk of the Assured on the effective date of termination of this insurance applies under the terms of "Shippers Order" Cotton Release signed by the Assured.

(e) In connection with the above agreement, referred to in Clause (a), loss under this policy shall be payable to Eugene B. Smith & Company, and/or one of the following carriers as their interests may appear:

Burlington-Rock Island Railroad Company
Missouri-Kansas-Texas Railroad Company of
Texas

Texas and New Orleans Railroad Company
Guy A. Thompson, Trustee, International-
Great Northern Railroad Company, Debtor.

F. M. BUTT & COMPANY,
Agent.

Special Rider No. 1

This endorsement is attached to and forms part of Policy No. OC 58587 of the National Fire Insurance Company, issued in the name of Eugene B. Smith & Company.

Plaintiff's Exhibit No. 1-E—(Continued)

(a) It Is Hereby Understood and Agreed that on "Shippers Order" cotton insured hereunder this policy shall not be vitiated by the agreement of the Assured with the North American Compress & Warehouse Co., Inc., Galveston, Texas, and the undermentioned carriers.

(b) In consideration of this agreement, the Assured undertake and agree to enter all such cotton on daily reports and pay premium thereon at agreed rates as of the date of delivery on the North American Compress & Warehouse Co., Inc., Galveston, Texas, without regard to outstanding bills of lading.

(c) Limit of liability under this policy for loss by any one casualty prior to shipment to final destination and prior to cotton having passed beyond control of the Assured is limited to Open.

(d) This policy and endorsement will cover continuously until cancelled in accordance with its terms and conditions.

It is further understood and agreed that from and after the date this policy is terminated in accordance with its terms and conditions all liability hereunder shall cease and terminate in respect to all cotton at risk of the Assured (except cotton in the hands of carriers in due course of transit to final destination) irrespective of whether or not any cotton at risk of the Assured on the effective date of termination of this insurance applies under the terms of "Shippers Order" Cotton Release signed by the Assured.

Plaintiff's Exhibit No. 1-E—(Continued)

(e) In connection with the above agreement, referred to in Clause (a), loss under this policy shall be payable to Eugene B. Smith & Company and/or one of the following carriers as their interests may appear:

Burlington-Rock Island Railroad Company,
Missouri-Kansas-Texas Railroad Company of
Texas,

Gulf, Colorado and Santa Fe Railway Company,

Texas and New Orleans Railroad Company
Guy A. Thompson, Trustee, International-
Great Northern Railroad Company, Debtor.

F. M. BUTT & COMPANY,
Agent.

Joint Account Rider

The protection granted hereunder extends to cotton, the property of the Assured and Ernst Cohn only while owned by them on joint account.

It is specifically understood and agreed that in event of loss under this policy, such loss shall be adjusted with and paid to Eugene B. Smith & Company only, whose receipt for such payment shall constitute a release in full of any and all liability on the part of this Company hereunder, subject, however, to the terms of Section 8, of Form 300, attached hereto.

Eugene B. Smith & Company covenant and agree

Plaintiff's Exhibit No. 1-E—(Continued)

to assume full responsibility for and compliance with all policy conditions as set forth in Form 300, attached hereto, including reports to this Company and the payment of premiums as provided for therein.

Attached to and forming part of Policy No. OC 58587 of the National Fire Insurance Company.

F. M. BUTT & COMPANY,
Agent.

330-C

Additional Interest Rider No. 3

It is understood and agreed that this insurance covers for the benefit of Eugene B. Smith & Company and also for the benefit of Eugene B. Smith de Mexico, S.A., as their respective interests may appear.

It is further specifically understood and agreed that in event of loss under this policy, such loss shall be adjusted with and paid to Eugene B. Smith & Company only whose receipt for such payment shall constitute a release in full of any and all liability on the part of this Company hereunder, subject, however, to the terms of Section 9, of Form 300, attached hereto.

The original Assured hereunder, Eugene B. Smith & Company covenants and agrees to assume full responsibility for and compliance with all policy conditions, including reports to this Company and the payment of premium as provided for.

Plaintiff's Exhibit No. 1-E—(Continued)

This rider may be cancelled by the Assured at any time, and by this Company on five (5) days' written or telegraphic notice to the Assured.

Attached to and forming part of Policy No. OC 58587 of the National Fire Insurance Company.

F. M. BUTT & COMPANY,
Agent.

Additional Interest Rider No. 2

It is understood and agreed that this insurance covers for the benefit of Eugene B. Smith & Company and also for the benefit of Eugene B. Smith Industries, Inc., Dallas, Texas, and Coastal Traders, Inc., Dallas, Texas, as their respective interests may appear.

It is further specifically understood and agreed that in event of loss under this policy, such loss shall be adjusted with and paid to Eugene B. Smith & Company; Eugene B. Smith Industries, Inc., Dallas, Texas, and/or Coastal Traders, Inc., Dallas, Texas, as their respective interests may appear, whose receipt for such payment shall constitute a release in full of any and all liability on the part of this Company hereunder, subject, however, to the terms of Section 9, of Form 300 attached hereto.

The original Assured hereunder, Eugene B. Smith & Company, covenants and agrees to assume full responsibility for the compliance with all policy conditions, including reports to this Company and the payment of premiums as provided for.

Plaintiff's Exhibit No. 1-E—(Continued)

This rider may be cancelled by the Assured at any time, and by this Company on five (5) days' written or telegraphic notice to the Assured.

Attached to and forming part of Policy No. OC-58587 of the National Fire Insurance Company.

The above has been carefully read and its conditions are assented to.

.....,

Assured.

F. M. BUTT & COMPANY,
Agent.

330-C

Additional Interest Rider No. 1

It is understood and agreed that this insurance covers for the benefit of Eugene B. Smith & Company and also for the benefit of Galveston Pickery, Inc., Galveston, Texas, as their respective interests may appear.

It is further specifically understood and agreed that in event of loss under this policy, such loss shall be adjusted with and paid to Eugene B. Smith & Company only whose receipt for such payment shall constitute a release in full of any and all liability on the part of this Company hereunder, subject, however, to the terms of Section 9, of Form 300, attached hereto.

The original Assured hereunder, Eugene B. Smith & Company covenants and agrees to assume full responsibility for and compliance with all

Plaintiff's Exhibit No. 1-E—(Continued)

policy conditions, including reports to this Company and the payment of premium as provided for.

This rider may be cancelled by the Assured at any time, and by this Company on five (5) days' written or telegraphic notice to the Assured.

Attached to and forming part of Policy No. OC 58587 of the National Fire Insurance Company.

F. M. BUTT & COMPANY,
Agent.

Form No. 300—SRCC—VSMM—Conc.

In consideration of additional premium as agreed this policy is extended, subject to its terms and conditions, to cover all cotton in compresses, warehouses or other concentration premises, including cotton in transit to original point of concentration in the United States or Canada, as follows:

(a) Damage, theft, pilferage, breakage or destruction of cotton in bales, directly caused by strikers, locked-out workmen, or persons taking part in labor disturbances or riots or civil commotions and destruction of or damage to such cotton directly caused by persons acting maliciously; also, by vandalism, sabotage and malicious mischief, including such losses directly caused by acts committed by an agent of any government, party or faction engaged in war, hostilities or other war-like operations, provided such agent is acting secretly and not in connection with any operation

Plaintiff's Exhibit No. 1-E—(Continued)

of military or naval armed forces in the country where the described cotton in bales is situated. Nothing in the foregoing shall be construed to include or cover any loss, damage or expense caused by or resulting from, (1) delay, deterioration or loss of market, or (2) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; invasion; insurrection; rebellion; revolution; civil war; usurped power; excepting only the acts of certain agents expressly covered above.

(b) This coverage shall remain in force until cancellation of this policy, in accordance with its terms, except that it may be cancelled by either party as of August 1st, noon, of any year, provided notice of such cancellation is given or mailed to the other party prior to such date and time.

(c) The rates agreed to at the time this coverage is issued shall remain effective during its currency, unless altered upon ninety (90) days' written or telegraphic notice by this Company.

Policy in all other respects remains unchanged.

Attached to and forming part of Policy No. OC-58587 of the National Fire Insurance Company.

F. M. BUTT & COMPANY,
Agent.

Plaintiff's Exhibit No. 1-E—(Continued)

300 FF—SRCC—VSMM—Tr.

In consideration of additional premium as agreed, this policy is extended, subject to all its terms and conditions, to cover cotton while in transit in the United States or Canada (excluding localling-in risk) as follows:

(a) Damage, theft, pilferage, breakage or destruction of cotton in bales, directly caused by strikers, locked-out workmen, or persons taking part in labor disturbances or riots or civil commotions and destruction of or damage to such cotton directly caused by persons acting maliciously; also, by vandalism, sabotage and malicious mischief, including such losses directly caused by acts committed by an agent of any government, party or faction engaged in war, hostilities or other warlike operations, provided such agent is acting secretly and not in connection with any operation of military or naval armed forces in the country where the described cotton in bales is situated. Nothing in the foregoing shall be construed to include or cover any loss, damage or expense caused by or resulting from (1) delay, deterioration or loss of market, or (2) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; invasion; insurrection; rebellion; revolution; civil war; usurped power; excepting only the acts of certain agents expressly covered above.

(b) This extension of coverage may be cancelled

Plaintiff's Exhibit No. 1-E—(Continued)

by the Assured at any time, and by this Company on thirty (30) days' written or telegraphic notice to the Assured, but such cancellation shall not affect the coverage on cotton already in transit Provided However (except for cotton already in transit) this Company hereby expressly reserves the right to cancel this entire contract in accordance with Clause numbered 15 of the Buyers Transit Form of which this endorsement is an extension.

(c) The rates agreed to, applicable to the hazards assumed by this coverage at the time of its issuance, shall remain effective during its currency, unless altered by this Company on forty-eight (48) hours' written or telegraphic notice to the Assured.

Policy in all other respects remains unchanged.

Attached to and forming part of Policy No. OC-58587 of the National Fire Insurance Company.

F. M. BUTT & COMPANY,
Agent.

ALLE 1

RULE 3

WILEY

except 85 at; on Nov 1944

FILE 3

FILE 1A

ALL: 17

ALLIE 18

M.I.E. 19

1111.1.E 20

The margins provided for in Rules Nn. 16, No. 17 and No. 18 to cover weight or quality differences, shall be in addition to the margins stipulated in Rule No. 13 for cotton on which the price has not been fixed.

Contract Dated Nov 4 1945
same conditions.

Plaintiff's Exhibit No. 1-E—(Continued)

I, C. L. Williams, doing business as F. M. Butt & Company, do hereby certify that I was doing business as F. M. Butt & Company on August 1, 1944, and as agent for the National Fire Insurance Company I issued National Fire Insurance Company policy No. OC 58587 on the 1st day of August, 1944, to Eugene B. Smith & Company.

I further certify that the attached policy, marked Exhibit "A," is a true and correct copy of National Fire Insurance Company policy No. OC-58587 issued by me, doing business as F. M. Butt & Company, on the 1st day of August, 1944, to Eugene B. Smith & Company.

/s/ C. H. WILLIAMS.

Subscribed and sworn to before me, this the 23rd day of October, 1950.

[Seal] /s/ VERE WADLINGTON,
Notary Public in and for
Dallas County, Texas.

Admitted October 27, 1950.

PLAINTIFF'S EXHIBIT 1-F

LOAN DRAFT

No. 970.

Atlanta, Ga., February 13, 1946.

The Cotton Insurance Association
of Atlanta, Ga.

At sight pay

to the order of

Eugene B. Smith & Company.....\$4867.43

Four Thousand Eight Hundred Sixty-seven and
43/100Dollars

which sum is advanced as a loan repayable only to the extent of any net collection we may make from any carrier, bailee or others on account of loss to 40 bales of cotton due to fire at Eloy, Ariz., on or about Jan. 25, 1946, or from any insurance effected by any carrier, bailee or others on said property, and as security for such repayment we hereby pledge to National Fire Ins. Co. the said claim and to deliver to them fully endorsed the bills of Lading and/or storage receipts for said property, and we agree to enter and prosecute suit against said Railroad, carrier, bailee, or others on said claim with all due diligence at the expense and under the exclusive direction and control of the said Nat'l Fire Ins. Co.

To
The Cotton Insurance Association
Through
The Citizens & Southern National Bank
Atlanta, Ga.

Claim No. 2280.

/s/ S. E. MOTLE,
Loss Supervisor.

(Loan Receipt attached in duplicate.)

[Stamped]: Paid Feb. 21, 1946, check No. 79149.

[Stamped]: Paid Feb. 21, 1946, collection statement, The Citizens & Southern National Bank.

[Stamped]: Commodity Department, Feb. 18, 1946, No. 45.

[Back of Draft.]

Notice

All Parties to Whom This Draft Is Payable
Must Endorse in Ink

Received from the: National Fire Ins. Co. the
Amount as Stated Herein, Subject to the Conditions Named in Face of Draft.

[Stamped]: Pay to the Order of Republic National Bank, Dallas, Texas, Previous Endorsements Guaranteed.

EUGENE B. SMITH & CO.

PLAINTIFF'S EXHIBIT No. 1-G

Received from National Fire Insurance Co. the sum of Four Thousand Eight Hundred Sixty-Seven and 43/100 Dollars as a loan and repayable only to the extent of any net recovery we may make from any carrier, bailee, or others, on account of loss or damage to cotton in bales, our property, due to fire at Eloy, Ariz., on or about the 25th day of January, 1946, or from any insurance effected by any carrier, or bailee, or others, on said property and as security for such repayment we hereby pledge to National Fire Ins. Co. the said recovery and deliver to them the bills of lading and/or warehouse or storage receipts for such property, and we agree to enter and prosecute suit against said railroad, carrier, bailee, or others, on said claim with all due diligence at the expense and under the exclusive direction and control of the said National Fire Ins. Co.

In Consideration of the said loan to us as aforesaid, we hereby represent and warrant unto the said National Fire Ins. Co. that we have not directly, or indirectly, released or discharged Eloy Gin Corporation or any person, firm or corporation from any liability or cause of action on account of said fire, or of the loss caused thereby, or in connection therewith.

Dated this 18th day of February, 1946, at Dallas, Texas.

EUGENE B. SMITH & CO.

By /s/ S. D. CONWAY.

Standard Form for Presentation of Insured Warehouse Receipt

Cotton Fire Claims

To: Eloy Gin Corporation, Warehouse Company
Eloy, Arizona.

(Location of Loss) Eloy, Arizona. (Date of Loss) Jan. 25, 1946.

(Name of person presenting claim) Eugene B. Smith & Company.

(Address of claimant) 1419 Cotton Exchange Bldg., Dallas 1, Tex.

Detailed Statement Showing How Amount of Claim
Is Determined

(If space below not sufficient, attach list)

Bale No.	Grade	Staple	Weight	Price	Amount
3736	Middling	1"	485		
3509	Middling	1"	518		
3510	Middling	1"	582		
3513	Middling	1"	478		
3514	Middling	1"	549		
3685	Middling	1"	525		
3734	Middling	1"	415		
<hr/>					
7 B/C.....3,552# @ 25.16					\$893.68
3413	St. Mid. Spt.	1 1/32"	470		
3411	St. Mid. Spt.	1 1/32"	570		
<hr/>					
2 B/C.....1,040# @ 25.51					\$265.30
3423	Middling	1 1/32"	515		
3516	Middling	1 1/32"	545		
3686	Middling	1 1/32"	480		
3687	Middling	1 1/32"	527		
3688	Middling	1 1/32"	564		
3711	Middling	1 1/32"	550		
3735	Middling	1 1/32"	535		
3754	Middling	1 1/32"	630		
3759	Middling	1 1/32"	515		
3761	Middling	1 1/32"	541		
3762	Middling	1 1/32"	515		
3763	Middling	1 1/32"	540		
<hr/>					
12 B/C.....6,457# @ 25.51					\$1,647.18
3515	St. Low Mid.	1"	520		
3712	St. Low Mid.	1"	560		
3713	St. Low Mid.	1"	520		
<hr/>					
3 B/C.....1,600# @ 24.01					\$384.16

Bale No.	Grade	Staple	Weight	Price	Amount
3737	Low Middling	1"	445		
3738	Low Middling	1"	500		
3520	Low Middling	1"	503		
3521	Low Middling	1"	531		
3594	Low Middling	1"	662		
3595	Low Middling	1"	478		
				<hr/>	
6 B/C.....				3,119# @ 20.76	\$647.50
3684	Low Middling	1 1/32"	535		
3592	Low Middling	1 1/32"	422		
				<hr/>	
2 B/C.....				957# @ 21.01	\$201.07
3744	St. Good Ord.	1"	488		
3745	St. Good Ord.	1"	570		
3748	St. Good Ord.	1"	480		
3593	St. Good Ord.	1"	446		
3596	St. Good Ord.	1"	544		
3746	St. Good Ord.	1"	605		
3747	St. Good Ord.	1"	558		
				<hr/>	
7 B/C.....				3,691# @ 18.91	\$697.96
7 B/C—Middling 1"				\$ 893.68	
2 B/C—St. Mid. Spts. 1 1/32"				265.30	
12 B/C—Middling 1 1/32"				1,647.18	
3 B/C—St. Low Middling 1"				384.16	
6 B/C—Low Middling 1"				647.50	
2 B/C—Low Middling 1 1/32"				201.07	
7 B/C—St. Good Ord. 1"				697.96	
				<hr/>	
Total 39 B/C				\$4,736.85	

In addition to the information given above, the following information and documents are submitted in support of this claim:

- (x) 1. Warehouse receipts representing cotton lost or damaged.
- () 2. Acceptable certification as to grade and staple, preferably by Government licensed classer.
- () 3. State whether this cotton is insured by you against loss or damage by fire. If so, give the name of Company and amount of insurance.....

You are hereby authorized for the undersigned's account to adjust any claim against the Insurance Company carrying insur-

ance through you, protecting the undersigned's interest in said cotton as the holder of such insured receipt, and to collect any sum that may be due the undersigned as the result of damage to such cotton, and to fully release said Insurance Company.

EUGENE B. SMITH & CO., INC.

By /s/ S. C. PIORSO.

Admitted October 27, 1950.

Mr. Fennemore: That will be fine. They will be easier to refer to when they are marked on the stipulation. Mr. Churchill, will you be sworn.

CHARLES NOBLE CHURCHILL, JR.

was called as a witness on behalf of the plaintiff, and being first duly sworn testified as follows:

Direct Examination

By Mr. Fennemore:

Q. Will you state your name, please?

A. Charles Noble Churchill, Jr.

Q. By whom are you employed, Mr. Churchill?

A. Eugene B. Smith and Company, Inc.

Q. In what capacity are you so employed?

A. I am their agent for Arizona.

Q. Arizona agent, and what are your duties as Arizona agent?

A. Buying and shipping and paying for cotton.

Q. For the account of Eugene B. Smith?

A. For the account of Eugene B. Smith and Company exclusively.

Q. How long have you been employed by Eugene B. Smith and Company?

(Testimony of Charles Noble Churchill, Jr.)

A. Since April 1st, 1942. [7]

Q. Now, at that time was Eugene B. Smith and Company a corporation? A. No.

Q. It was just——

A. (Interrupting): Just a company, sole owner as far as I know, by Mr. and Mrs. Eugene B. Smith.

Q. And subsequently it became a corporation and you went right ahead on working for the corporation, is that correct? A. That is correct.

Q. How long have you been engaged in the cotton business? A. Since 1914, September.

Q. That is a period of some 35 odd years?

A. With the exception of three years that I was in the service during the First World War.

Q. And as a result of your experience in the cotton business, are you thoroughly familiar with the customs of the trade?

A. I believe that I am.

Q. Now, in connection with the cotton involved in this action, was this cotton purchased through your office in '45?

A. The cotton that was involved in the fire?

Q. In the fire.

A. It was purchased as a part of a contract [8] for later delivery.

Q. If you will refer to Exhibit A and Exhibit B, that will be Exhibit 1-A and Exhibit 1-B, are those copies of contracts which included this cotton that was destroyed in the fire?

(Testimony of Charles Noble Churchill, Jr.)

A. I believe they are exact copies, yes, sir.

Q. Now, what is the method of buying cotton in general, Mr. Churchill? Do you send in a written order first or how do you order it?

Mr. McKesson: I object, your Honor, as to what the custom is, what he did in this case.

Mr. Fennemore: In this particular case, if you remember? Do you remember how you bought this cotton to begin with?

A. The cotton was offered to us in a thousand bale contract to be delivered when ginned, and, of course, when the bale receipts were issued and invoiced to us——

Q. (Interrupting): Well, all I am getting at, Mr. Churchill, is when these particular agreements were executed. Were they executed after you already told them you would buy the cotton?

A. The contract was, yes. We sent it to them for signature and then put our signature on it at the same time. They kept one copy and sent two copies back to us. [9]

Q. Then as the cotton was ginned, what was the next step in the procedure?

A. The cotton is invoiced after the Government class cards are received showing the grade and staple on each bale so as to determine the market difference, what we call the different premium and discount on each grade and staple.

Q. Now, if you will refer to Exhibit 1-C, which consists of 39 yard receipts and weight certificates covering this particular cotton, when were those

(Testimony of Charles Noble Churchill, Jr.)

particular documents prepared with reference to the general procedure of getting this cotton to you?

Mr. McKesson: I think the record speaks for itself, your Honor please, it shows on its face. It has been entered in evidence.

The Court: He might not——

Mr. Fennemore (Interrupting): I am simply trying to get the procedure that is followed.

The Witness: I didn't quite get that.

Mr. Fennemore: I mean, when are these issued with reference to the procedure in getting the cotton baled and inspected by the Government and into your hands?

A. These were issued on the date shown on each gin receipt. That was December 12th, 1945, [10] to December 13th on the first three bales and then a consecutive—various dates on them. It shows the dates as late as December 20th, 1945.

Q. And were those issued after the cotton was baled and inspected?

A. I would not say "inspected." The usual procedure is to issue this gin receipt as soon as the bale of cotton is, you might say, manufactured or put together. They bring in a list of the bales from the press docks, tag the gin, the usual procedure, and in the office the gin clerk takes that list and copies down a tag number on a corresponding gin tag receipt, tag number, and fills in the weight and enters the date that that bale was so ginned.

Q. I see. Then after these are prepared, these particular ones are, as we have stipulated, were

(Testimony of Charles Noble Churchill, Jr.)

sent to the Valley Bank with the draft attached, is that correct? A. That is right.

Q. Now, was payment for them made at the Valley Bank on presentation, or was it necessary to send them to Dallas?

A. No, they are paid on presentation with draft at the Valley Bank at Phoenix.

Q. Now, each of these documents show at [11] the bottom, has a notation "Ginning, Bagging and Ties, Storage and Insurance for first 20 days," marked "paid." For whom are they paid and how?

Mr. McKesson: I object to that, they speak for themselves.

The Court: Well, I know, but you are familiar with this case. I don't know anything about it.

Mr. McKesson: Oh, I see.

The Court: Now, what exhibit do you refer to?

Mr. Fennemore: I am referring to Exhibit 1-C, which consists of 39 gin receipts, and my question is by whom the first 20 days paid.

The Court: All right, you may answer.

A. The first 20 days insurance is normally and usually paid by the producer or the farmer, the customer of the gin.

Mr. Fennemore: That is the custom of the trade?

A. That is the custom of the trade of all gins in Arizona so far as I know.

Q. Now, what is the procedure for the payment of insurance and storage after the first 20 days, if there is a custom?

(Testimony of Charles Noble Churchill, Jr.)

Mr. Jenckes: We object to that on the [12] ground it is immaterial.

Mr. Fennemore: What is the custom?

Mr. Jenckes: I don't think that has anything to do with this case. The gin receipts say this that there wasn't any charge made for it, so what does custom have to do with it?

Mr. Fennemore: It doesn't say anything about the custom.

Mr. Jenckes: It says on this blank that there wasn't any charge.

Mr. Fennemore: It doesn't mean there wasn't any charge.

Mr. Jenckes: He can ask this witness if there was a charge, but I don't think he ought to ask about the custom and practice. If they made a charge this witness can testify to it, but why the custom and practice?

Mr. Fennemore: Because the point is, all of these contracts are made in the light of a practically universal custom which was accepted by the cotton buyers and by the gins. I simply want to show what that custom was in the light of which all of these contracts were made.

The Court: Well, if that is true, why not have it comply particularly to this transaction? There might be deviations or exceptions under some [13] circumstances.

Mr. Fennemore: That is true, but under this particular transaction, nothing was said one way or

(Testimony of Charles Noble Churchill, Jr.)

the other. They simply contracted in the light of what was the accepted custom.

Mr. McKesson: If your Honor please, that is not true and we do not stipulate and object to any evidence as to the custom. What was done in this case and what controls, because the entire transaction was not handled as an ordinary custom.

The Court: Well, all right, then, let the witness testify if he is able to as to what was done in this particular instance.

Mr. Fennemore: In this particular case, was there any specific agreement with respect to the payment of storage and insurance after the first 20 days?

Mr. McKesson: Your Honor, please, I object to that. That is a different question, and the gin receipts under 1-C speak for themselves.

Mr. Jenckes: Not only that, if there was any payment or any charge made to Smith, this witness can testify whether there was or whether there was not, if he knows.

The Court: Well, that is probably true. Was there any payment made after the 20 days? If [14] so, by whom?

Mr. Fennemore: Well, if the Court please, it is my understanding, if he doesn't know whether there was any payment or not, that there was a custom among all of these gins and all of these producers followed with respect to this insurance, and when they bought these receipts everybody assumed that that practice would be followed, that that was the

(Testimony of Charles Noble Churchill, Jr.)

universal practice with the gins in this area and to the extent that the contracts were made, everybody just assumed that that practice would be followed. Whether it was followed in this particular case, the records are in such terrible condition, nobody knows, and, of course, there is so much cotton bought and sold, not only by Eugene B. Smith, but by all of these people. The purpose of the testimony is to show what the custom was in the light of which it was assumed it would be followed by these particular contracts.

Mr. Jenekes: I think it is wholly immaterial, if your Honor please. If it could be shown what the evidence was in this case and, certainly, it can be shown if they paid for insurance in storage, they certainly know it. If they didn't pay for insurance in storage, that is another thing. I [15] think the fact is evident, and now Mr. Fennemore is trying to leave the Court with the impression that that was the ordinary custom. It may have been, but it was not true in this case, and the receipts themselves show it apparently was paid but no charge made. You see, this receipt shows it was issued by Eloy to the Eloy Gin and Eloy sold the cotton to Smith, so it is not the situation that you might have where Eloy was holding the cotton for somebody else. There wasn't any charge made because Eloy owned the cotton when it sold it to Smith, but what the custom was in other situations doesn't have a thing to do with this case. It is wholly irrelevant and immaterial.

(Testimony of Charles Noble Churchill, Jr.)

Mr. Fennemore: I might say for your Honor's benefit, what I am trying to show here is that these charges were always paid by billing subsequent to delivery. That was the universal custom, and that billing was made at any time from a few days after to sometimes a year later, but always they were billed for insurance and storage at some subsequent date.

The Court: Was that done?

Mr. Fennemore: We don't know whether it was done or not. If it was done, it was paid, and [16] if it was not done, we will pay it any time they will bill us.

Mr. Jenckes: If your Honor please, there wasn't any charge for it. Certainly, if they paid for it, it will show it.

Mr. Fennemore: I am inclined to think actually they didn't bill it because they deny liability on the cotton itself.

The Court: You can make your offer of proof. I don't believe I will let you show it, but you can make your offer for the record.

Mr. McKesson: If your Honor would take time to look at one of the receipts to see there was no charge made.

The Court: You can make your offer of proof.

Mr. Fennemore: Well, we offer to prove that the custom of the trade in the light of which these contracts were made was for insurance and storage charges after the first 20 days were billed by the respective gins to the purchaser at some later date,

(Testimony of Charles Noble Churchill, Jr.)

which varied from different gins anywhere, in some cases, a day after delivery to about as much as a good many months afterwards, and that it was understood by the Eugene B. Smith and Company, through its agent, and by Eloy, that that practice would be followed with respect to [17] these, and that had they been presented with a bill for the storage and insurance in excess of the 20 days, the bill would have been paid, but they probably do not have the records and in all probability the bill was not presented because they deny liability on the 39 bales.

The Court: All right, now you object to that?

Mr. McKesson: I object on behalf of the insurance company as irrelevant and incompetent and not binding upon the defendant, the Home Insurance Company, and also on the ground it is an attempt to prove something to the contrary about the written agreement which was introduced in evidence under 1-C in this case, showing that the gin yard receipts for 39 bales, the gin yard receipts that are in evidence was that the first 20 days storage and insurance was paid, and as to the future part, it is blank, and that the gin receipts show it was issued by the Eloy Gin Corporation to itself and then there is a blank endorsement on the back which went with the drafts to the bank and were paid.

Mr. Jenckes: The same objection for Eloy Gin.

The Court: All right, I will sustain the [18] objection.

(Testimony of Charles Noble Churchill, Jr.)

Mr. Fennemore: Mr. Churchill, I assume you have no independent recollection of whose cotton this was; I mean, the producers of the cotton were?

A. We have a record of it in our office. The cotton belonged to several farmers and was invoiced for their account, and whether they had been paid for it by Eloy Gin Corporation is something that would be a matter of the way they handled their business.

Q. You don't know whether the Eloy had paid for it prior to delivery to you or not?

A. No, I don't.

Q. None of this was Eloy produced cotton, though?

A. There were some cases where the Eloy Gin Corporation, to the best of my knowledge, farmed some land in their own name and then they farmed some in the name of various tenant partnerships or independent——

Q. (Interrupting): I understood according to your records this particular cotton was several farmers' cotton.

Mr. Jenckes: Your Honor, please, we object to this line of testimony. I think it is wholly [19] immaterial and we move to strike the testimony.

The Court: Well, that doesn't prove anything one way or the other.

Mr. Jenckes: Not that I can see. That is, we don't like to have anything in the record that we don't have the effect of.

Mr. McKesson: Your Honor, please, we object

to that. On these two contracts, one for 300 bales and one for a thousand bales, that would be a question of title to the property and it is entirely immaterial, and the Home Insurance Company also moves to strike the testimony.

The Court: It may stand.

Mr. Fennemore: I don't think it is particularly material one way or the other. It happens that these receipts show it is the Eloy Gin Corporation; for instance, one was to J. E. Tucker, I see, and Eloy handled it that way as a matter of convenience. That is all we have.

Mr. McKesson: No questions.

The Court: That seems to be all.

Mr. Fennemore: May Mr. Churchill be excused?

Mr. McKesson: Subject to call by telephone. By the way, Mr. Jenckes, yesterday, after consultation you agreed to stipulate that this [20] amended Complaint of your, you charged that \$4,736.85 to the amount that we computed for you yesterday, which is now \$4,028.61 that you changed, or——

Mr. Fennemore (Interrupting): Well, I don't think it is necessary to amend the Complaint again, simply that we agree that the value of this cotton, for the purpose of this suit, is \$4,028.61 instead of the \$4,700 odd which is named in the Complaint.

Mr. McKesson: Named in Paragraph 3.

The Court: Yes, I made the insertion.

Mr. McKesson: So stipulated.

Mr. Fennemore: And we have a deposition, your Honor. Do you want to go through——

Mr. McKesson (Interrupting): If you will give

us about five minutes on this maybe we can just save the Court's time by not reading this into the record, if your Honor please.

The Court: All right.

Mr. Fennemore: That will be all of our case when that goes in.

Mr. McKesson: These corrections aren't made on the original—that I have, on the copy. There are certain things he could not supply—memorandums on there. We have no objection to the [21] deposition, if your Honor please, to any particular questions or answers, other than the witness seemed to have with him at the time of the deposition the wrong insurance policy and he said he didn't know whether it was the right one or not, and at one time was referred to as the Royal policy, but according to our stipulation here, the Royal policy in effect at that time was introduced in evidence as Exhibit 1-E, or they have introduced the 1-E down there.

Mr. Fennemore: I think we could probably correct the record so there will be no misunderstanding by stipulating that on page 16, when the questioner—

The Court (Interrupting): What policy are you referring to, the one issued to Smith or the Eloy Gin?

Mr. McKesson: The one issued to Smith.

Mr. Fennemore: The questioner asked him the question: "Have you made any claim or accepted any payment under this Royal Insurance Company policy?" and the witness answered: "I accepted a

payment, yes, sir." That should have referred to the policy issued by the National Fire Insurance Company and the question and answer can be corrected accordingly to show the actual facts. [22]

The Court: You can correct it.

Mr. McKesson: But the real policy that Eugene B. Smith has is introduced in evidence as 1-E.

Mr. Fennemore: The record may show I have corrected the question on page 16 by writing in the word "National" and striking out the word "Royal." May the deposition be received in evidence?

The Court: Yes.

(Thereupon the document was received in evidence as Plaintiff's Exhibit Number 2.)

[Plaintiff's Exhibit No. 2, Deposition of T. S. McCorkle, set out in full at pages 116 to 144 of this printed record.]

Mr. Fennemore: Mr. Bolt.

Mr. McKesson: Are you calling him as your witness?

Mr. Fennemore: Are you going to put him on?

Mr. McKesson: I don't know.

Mr. Fennemore: I had better have him for the sake of the record, then.

GEORGE K. BOLT

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows: [23]

Direct Examination

Mr. Fennemore:

Q. Will you state your name for the record, sir?

A. George K. Bolt.

Q. By whom are you employed?

A. General Adjustment Bureau.

Mr. McKesson: Now, if your Honor please, may the record show that the plaintiff is using Mr. Bolt as their witness on direct examination and he is not an officer of the Home Insurance Company to the extent he can be called for cross-examination?

The Court: Well, they haven't made any such claim.

Mr. McKesson: Yes, but I know, I just want to point that out.

The Court: All right.

Mr. Fennemore: By whom were you employed in the early part of 1946, Mr. Bolt?

A. The General Adjustment Bureau.

Q. And what is the General Adjustment Bureau?

A. It is an organization functioning to adjust losses under insurance policies, representing insurance companies.

Q. It represents insurance companies in the [24] adjustments? A. Yes.

Q. At that time did you have occasion, that is, either in January or possibly in February of '46,

(Testimony of George K. Bolt.)

did you have occasion to adjust a loss at the Eloy Gin? A. Yes.

Q. And included in the loss that you adjusted were the 39 bales in controversy here, were they not? A. No, I am not sure.

Q. Let me change my question: Included in the bales that were burned up at that time in the fire that occurred on January 25th, there were the 39 bales involved in this action, is that not correct?

A. Well, actually, I think there were 27—37.

Q. There was 37 of these 39?

A. Yes, I think in a fire on January 25th.

Q. Now, in making that adjustment did you handle that entirely by yourself, let me ask you that? A. Yes.

Q. And did you assist the Eloy Gin representatives in making up their proofs? [25]

A. The proof was typed in our office.

Q. Did you advise the Eloy Gin representatives that you were working with that the cotton involved in this action was not covered by insurance?

Mr. McKesson: I object to that as immaterial as far as this case is concerned.

The Court: He may answer.

A. I advised them that in my opinion that it was not covered.

Mr. Fennemore: And you had arrived at that opinion, had you, by reason of an opinion given you by one of the counsel for the insurance companies? A. No.

Q. Did you ask for any such opinion?

(Testimony of George K. Bolt.)

A. Yes.

Mr. McKesson: I object as immaterial.

The Court: He may answer.

Mr. Fennemore: You asked for a legal opinion?

A. Yes.

Q. And whom did you ask for that opinion?

A. Mr. McKesson.

Q. Did he give you the opinion? A. Yes.

Q. And then you transmitted that information to Eloy? [26] A. To the insurance company.

Q. Well, didn't you advise Eloy that this cotton should not be included in the Proof of Loss?

A. Yes, I advised them that in my opinion the cotton was not a proper item.

Q. They followed your opinion, is that correct?

Mr. McKesson: Your Honor, please, this is cross-examination. I object to that as immaterial. On direct examination you might go into a lot of issues, but he is his own witness. He certainly can't cross-examine his own witness.

The Court: I don't believe he has.

Mr. Fennemore: I just want to get at the facts.

The Witness: Your question?

Mr. Fennemore: What was the last question—that is, they did not include the cotton involved here in the Proof of Loss then? A. No.

Mr. Fennemore: That is all.

(The witness was excused.)

Mr. Fennemore: Now, to save calling opposing counsel as a witness, may it be stipulated that the

Home Insurance Company, from the time of [27] filing of this action until the date of the filing of the separate Answers of a recent date which the Clerk's record will show, conducted the defense of this action both on its own behalf and on behalf of the Eloy Gin Corporation. May that be stipulated?

Mr. McKesson: Why, I won't stipulate to any such thing as that. The record speaks for itself. If that is what it shows, then, that is what it is.

Mr. Fennemore: Well, as I say, I was going to save Mr. McKesson the necessity of becoming a witness for me.

The Court: Well, he won't stipulate, so that settles that.

Mr. McKesson: The record shows.

Mr. Fennemore: What does the record show?

Mr. McKesson: I don't know, you got the record there. I object to that anyway as immaterial, has nothing to do with the trial of this case.

Mr. Fennemore: It bears on two points on waiver, your Honor.

Mr. McKesson: Certainly, there is no evidence of that in here and there is no pleadings here and no evidence could be received pertaining to a [28] waiver on anybody's part.

Mr. Fennemore: No necessity for pleadings on the thing. The matter appears in the Answer, not in the complaint, and claim is made, first, that the action should have been filed within one year and, secondly, there was no Proof of Loss filed. This goes, first, to the question as to whether the insurance company at this late date can still insist on

either of these points when it has, first of all, participated in preparing Proofs of Loss and, secondly, they conducted this litigation for almost four years without ever raising those questions.

The Court: All right.

Mr. Fennemore: I will have to ask you to be sworn, Mr. McKesson.

Mr. McKesson: What is it you want?

Mr. Fennemore: Well, I simply want either a statement that the Home Insurance Company conducted this litigation up until the date when the separate Answers were filed both for its own account and for the account of the Eloy Gin Corporation.

Mr. McKesson: I still say the record speaks for itself, your Honor, please.

Mr. Fennemore: I take it you are not [29] willing to so stipulate?

Mr. McKesson: No.

Mr. Fennemore: I will have to ask you to be sworn.

Mr. McKesson: Will you call me as your witness now?

Mr. Fennemore: Yes, I will take that chance.

Mr. McKesson: I want my witness fee.

THEODORE G. McKESSON

was called as a witness by the plaintiff, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Fennemore:

Q. Your name is Theodore McKesson?

A. Yes, sir.

Q. And you are one of the attorneys of record in this matter? A. Yes, sir.

Q. Will you state the circumstances under which you were employed to defend this action?

A. Can I object to the question, your Honor, please? That is a matter of relationship between attorney and client. [30]

Mr. Fennemore: Let me ask you this question and you can give me your conclusions, Mr. McKesson: Were you employed by the Home Insurance Company to defend this action when it was originally filed?

A. It came to my office to be answered.

Q. And who employed you for that purpose?

A. Well, I don't know. I presume they were both sued at the same time and both complaints came in and nothing was said about it.

Q. Who brought the complaints to you?

A. I don't know whether they came by mail or somebody handed them to me. I don't know.

Q. And to whom did you look for your compensation in the matter?

A. Well, may I object to the question, if your

(Testimony of Theodore G. McKesson.)

Honor please? That is immaterial who is going to pay me as far as this lawsuit is concerned. If the Court wants me to answer that I will answer.

The Court: Well, you represented both parties?

A. I did.

The Court: That should cover it.

The Witness: I answered for both of them, and in order to shorten your story here, this [31] case was set for trial on two or three occasions and then finally Mr. Fennemore thought that he would have to amend and I stipulated that he amend and at the same time he stipulated, which is in the record, that I might file any defense I may see fit to his amended complaint, which I did, and I filed separate motions to dismiss, and Answers on behalf of the Eloy Gin Corporation, and separate motions to dismiss and separate Answer for the Home Insurance Company to the amended complaint, and then I advised the Eloy Gin Corporation and their attorneys, Mr. Jenckes and other people interested in the Eloy Gin Corporation that there might arise the question of difference of rights between the Home Insurance Company and the Eloy Gin Corporation in the event that the plaintiff might be able to prevail——

Mr. Fennemore (Interrupting): Just a minute, Mr. McKesson, that is not responsive to any question I asked.

The Witness: So the Eloy Gin Corporation employed separate counsel and Mr. Joe Jenckes was here representing them on Monday of this week,

(Testimony of Theodore G. McKesson.)

and he filed an amended Answer, a Motion to Dismiss, and so forth, to your amended complaint [32] and then filed a cross-complaint and the Court permitted——

Mr. Fennemore (Interrupting): If the Court please, I see no reason——

The Witness (Interrupting): Well, that is the record.

Mr. Fennemore: Let me ask you one final question: Did you have any agreement with the Eloy Gin Corporation that they will compensate you for your work in their behalf?

A. I have no agreement with anybody, but I am going to be compensated.

Q. The truth is, you will be compensated by the Home Insurance Company?

A. Well, I don't know whether they will jointly pay me. They got a new attorney now, but I certainly done a lot of work for them in the past.

Mr. Fennemore: The plaintiff rests.

Mr. Jenckes: Your Honor, please, at this time the Eloy Gin Corporation moves that the Court enter judgment for the Eloy Gin, to the effect that the plaintiff take nothing by its complaint against Eloy Gin. It appears from the complaint that certain cotton of the Eloy Gin was sold to Smith and that apparently there was some [33] statement in a gin yard receipt with respect to covering it with insurance. At least, that is the allegation in the complaint. Later on in the complaint it is specifically set forth that such insurance was obtained.

Now, frankly, at the moment I am completely at a loss as to how the complaint states a cause of action against us or how the evidence establishes any cause of action against us. Apparently, if this action is predicated upon a contract to insure, not only the complaint, but the evidence discloses that we complied with that contract. Now, under those circumstances I can't see how we should be kept in the case any longer.

The Court: I don't know. What do you think about it?

Mr. Fennemore: Well, if the evidence does disclose that they be insured and that the insurance is collectible, then our cause of action is against the Home Insurance Company, but it is very questionable whether the evidence shows that they got insurance which is of any benefit to us and took advantage of it. It may be that at the close of the case I may ask for leave to amend to conform to the evidence to add the allegation [34] that if they did have insurance and did not take steps to collect, which they were obligated to do under the policy.

Mr. Jenckes: Well, there is no allegation of that now.

Mr. Fennemore: There is not now. If the evidence shows that, I ask leave of the Court to make that amendment in the alternative.

Mr. Jenckes: We object to that very strenuously. We didn't come in here to defend a cause of action which——

Mr. Fennemore (Interrupting): The evidence

shows definitely they did not include this insurance in their Proof of Loss——

The Court: Yes.

Mr. Jenckes: There is no obligation we have to take on the duty——

Mr. Fennemore (Continuing): ——to conform with the evidence shown, and without objection I ask leave to amend the complaint.

Mr. Jenckes: We object on the ground it is wholly immaterial whether we did or whether we didn't, and, second, we are taken wholly by surprise. Frankly, the complaint does not even state a cause of action that I can see. We are charged apparently with the duty to get some [35] insurance and then it says in the complaint we got the insurance. The evidence shows we got the insurance. Now, there is certainly no allegation that we had any duty to collect for them. They could collect themselves if they wanted to. What duty did we breach?

The Court: Well, is there any duty cast upon the gin company to get this cotton insured?

Mr. Jenckes: Well, I say, in the first place, if your Honor please, that there was not, because of the fact that when they bought the cotton, the contract which is in evidence provides that it was at the seller's risk until paid for, and the general rule is, under the Sales Law, that where a purchaser has bought an article from a seller, the article remains in the possession of the seller until after payment and title passes, and the risk on that cotton then falls upon the purchaser, so that in this

case it is our contention that not only under the Sales Act did the risk fall upon the purchaser, but, secondly, we had no duty to insure it and, third, if we had that duty, we complied with that duty. The policy specifically covers cotton in our hands belonging to a purchaser where we have sold it and, so, we performed all that we were required [36] to perform if we had any duty whatsoever. Now, if it is contended that we had to go further and that we had to make collection for them, there certainly is no contractual agreement anywhere pleaded, nor proof that we made such an agreement to collect for them. The law is, as I think it is, that the bailor in a case of this kind can collect on that insurance if he wants to. If they wanted to sue the Home, they could have sued the Home a long time ago, but they didn't. They bring us in because we did what we were supposed to do, so what are we doing in a lawsuit?

The Court: I don't know.

Mr. Fennemore: Well, if the Court please, if they did insure——

The Court (Interrupting): Well, they did, that is obvious because there is a policy issued.

Mr. Fennemore: The policy covered our cotton and that policy required them to make a Proof of Loss and collect it. It is payable to them and not to us. As I have already asked, may we amend the complaint in the alternative, that if they did insure, that they failed to take the necessary steps to make that insurance effective by making a Proof of Loss?

Mr. Jenckes: There isn't any allegation [37]

anywhere that we did have any such duty or that we so contracted. Secondly, I think the general rule is, reading from *Richartz versus Martin*, 31 N.W. 2d, 158, I will just read the headnote:

“Generally, where bailee has taken out insurance on bailed property, bailor may maintain an action directly against the insurer even though the bailor is not named in the policy, and though the policies are payable to or adjustable with the bailee only.”

Now, that is our case. Wisconsin says that is the general rule, so if they had a right to come in and take the benefit of the insurance that we secured for them, I don't see how you can create any implication that there was a duty on our part to go ahead. As a matter of fact, I think Smith was the real party in interest. It was his cotton. He was the one who suffered the loss, and I might go one step farther, if your Honor please, it is in the case of *Harwood-Yancey versus Lawrenceburg Warehouse Company*, 65 Southwestern 2d, 193, and it is almost identical with this case. The headnote reads:

“Holder of negotiable warehouse receipt, who also carried general insurance under policy providing for advance, in case of loss, of amount [38] of recovery from bailee, could not, for benefit of general insurer, sue warehouse men for breach of agreement to insure.”

Now, that is right smack on the nose, and just reading the subheading:

“Holder of warehouse receipt could not sue for benefit of general insurer insuring all his cotton,

under policy which excluded from coverage cotton for which any carrier or other bailee was liable, and providing that, in event of loss, insurer would advance, as loan to insured, amount of loss or damage repayable only to extent of any recovery from bailee, since inasmuch as insured recovered under such policy, he had sustained no loss from warehouse company's breach of contract to insure except cost of premium on general policy, and he had no right of action for lack of insurance, and therefore there was no right of action to which general insurer could be subrogated, save suit for amount of premium."

Now, if that is the rule under the circumstances of this case that we have no liability even if we didn't insure, because the fact that he went out and got his own insurance and paid for it, then how on earth, if we did go a step farther and actually issue insurance, how then [39] could we create any more liability than if we didn't take insurance at all? Now, we are just not the proper party in this suit. It may be he has a claim against the insurance company, but not Eloy Gin. Mr. McKesson points out that the stipulation is that it was paid for and it goes back to the contract that was made between the parties to the effect that the insurance was at the seller's risk until paid for. If that means anything, it must mean it was at the buyer's risk after it was paid for and, of course, that is the general rule under the Sales Law, the uniform Sales Act, that it is at the buyer's risk after it is paid for, so I just don't know why I am here, your Honor, and

if I have to proceed to defend, I am kind of in a bind, because I don't know what to defend against.

Mr. McKesson: I have some motions also to make.

Mr. Fennemore: As far as the cases Mr. Jenckes has, there are two particular cases and there are other squarely to the contrary.

The Court: There usually are.

Mr. Fennemore: One Supreme Court decision of the United States. I'd like to submit all the authorities to your Honor and you can pick [40] between them, and I would like to have your Honor rule on my motion for leave to amend in the light of the evidence.

The Court: Well, I will permit you to make the amendment. If Mr. Jenckes is right it wouldn't make any difference.

Mr. Fennemore: I will have to prepare that, but the amendment will be in the alternative, that if they did insure they did not take the proper steps to protect the insurance that they were obligated to under the terms of the policy.

Mr. Jenckes: If your Honor please, it makes this difference, that I am now confronted with dereliction, alleged dereliction of duty that I was not confronted with before.

The Court: Well, if you are not required to, what difference does it make?

Mr. Jenckes: I will agree with you if I was not required, but then I ought to be dismissed out of the case. I think the thing ought to go a step at a

time. I don't think we should defend a case where the cause of action is not pleaded.

The Court: All right.

Mr. McKesson: If your Honor please, at this time the Home Insurance Company moves for judgment against the plaintiff in this action [41] on the ground and for the reason that, first, that the complaint fails to state a claim against us and the evidence fails to state a claim against the Home Insurance Company, and also the record shows that there is no privity of interest between the Eugene B. Smith and Company and the Home Insurance Company, and that the uncontradicted evidence in this case is Exhibit 1-D, as part of the stipulation, which was our Policy Number 6857 that was introduced by the plaintiff, and that policy, among other things, provides that this policy insures the Eloy Gin Corporation and loss, if any, to be adjusted with the insured named herein and payable to insured. It is not payable to any other person at all, Eugene B. Smith or anybody who holds a storage receipt or anything else.

I refer your Honor to Plaintiff's 1-D, which is the plaintiff's evidence here introduced and reading from the policy, it says:

"This policy insures Eloy Gin Corporation. Loss, if any, to be adjusted with the insured named herein and payable to insured on merchandise of every description, except as hereinafter excluded, consisting principally of cotton by-products, materials and supplies manufactured [42] or in process of manufacture, or on materials for manufacturing

same, including packages, labels, cases, boxes and all wrapping and packing materials, all being the property of insured or sold but not delivered or removed; and, provided the insured shall be liable by law for loss or damage thereto or shall have specifically assumed liability therefor, this insurance shall also cover merchandise held in trust, or on commission or consignment, or left for storage * * *." So, the evidence is on the part of the plaintiff that this is their policy and it ran to the Eloy Gin Corporation and the Eloy Gin Corporation made no claim upon the Home Insurance Company for these 39 bales of cotton right away, but if they lost the other bales of cotton and this action was instituted, if we were insured under it, why, it would be out anyway because this is a New York Standard Form and no action was instituted within one year. Our legislature readopted the New York Standard Form in '45, and the New York Standard Form provides that no action shall be sustainable unless commenced within 12 months next after inception of the loss. It is true that the statute of limitations on an ordinary contract is six years after it becomes due, but [43] this has been adopted two or three times since, so the one year would apply on that. Then, further than that, so far as—if we could be considered in it at all, so far as this evidence is concerned, this Exhibit 1-A and 1-B which was covered by Mr. Jencke's motion, both contracts provide:

"We hereby confirm having purchased from you today, through conversation with Jack Pretzer, 300

bales of cotton." The next is for a thousand bales at grade, staple, price, delivery in lots of not less than 100 bales, as fast as ginned and cards obtained; terms, weights, insurance at seller's risk until payment completed; reimbursement, sight draft, gin yard receipts attached, also Smith—doxy cards; draw on Eugene B. Smith and Company care of Valley National Bank, Phoenix, Arizona, invoices in duplicate.

Now, it is stipulated, according to our stipulation of the facts, that these two contracts for 1,300 bales were carried out prior to this fire and all had been paid for, and that all of the cotton, all the 1,300 bales had been removed from the gin yard with the exception of these 39 bales, and they had not been taken away, so the evidence of Mr. Churchill is, and the deposition [44] which is in evidence, shows that immediately when they pay for the cotton, why, they have it insured themselves at their risk, and that is customary, and in the depositions in the record here where the man that is down in Dallas, he said he didn't know anything about these contracts or anything about it, but whenever their company bought cotton and they owned it, they always had it insured, so this is a special agreement whereby it was at the seller's risk, and the stipulation is it was all paid for, so I think the motions of the Eloy Gin Corporation should prevail at this time, as well as mine on behalf of the Home Insurance Company. There is certainly the privity of interest.

The Court: Then that will settle the case. All

you have to do is rest. Both you and the Eloy Gin submitted?

Mr. McKesson: Well, I would just like, if the Court isn't going to do that, I want to just put on just a little bit of evidence to the effect that our original Proof of Loss which was sent up by the Eloy Gin, it did not include these 39 bales of cotton.

The Court: Mr. Bolt testified to that.

Mr. Fennemore: That is already in the [45] record.

Mr. McKesson: It was not included in the Proof of Loss.

The Court: Yes.

Mr. Fennemore: And the reason for it. Could we recess until right after lunch and let you know?

The Court: Yes. You were both so certain of your position I didn't expect you to offer anything.

Mr. Fennemore: Yes, we are.

Mr. Jenckes: That is why we think the motion should be granted.

Mr. McKesson: I know, but Mr. Fennemore said he had some cases.

Mr. Jenckes: I will tell you frankly, I am willing to rest at this time upon the admission that the only cause of action attempted to be proven here, attempted to be pleaded against the Eloy Gin is apparently the contract of insurance, or the implied contract that Mr. Fennemore has mentioned in his amended complaint, that we apparently failed to carry through and collect the proceeds. If that is the case I am perfectly willing to rest at the moment. I take it that is true, is that right?

Mr. McKesson: I'd like to see his amendment.

The Court: All right, we will recess until [46] two, then.

Mr. McKesson: And the witnesses be instructed to be back at two o'clock?

The Court: All right.

(Thereupon a recess was taken at 12 o'clock noon.) [47]

(Two o'clock p.m., after recess, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

Mr. Fennemore: If the Court please, I have prepared an amended pleading to plead the alternative as I suggested this morning in my motion. I just found out, though, that my secretary, in writing it out, has made a mistake in one paragraph which I find we had as the alternative. If it is agreeable with counsel to file the pleading, there will be no other change.

Mr. Jenckes: That is Paragraph 3 of the second cause of action?

Mr. Fennemore: Yes.

Mr. Jenckes: In other words, you want to allege that, three, there was a policy issued by the Home Insurance Company?

Mr. Fennemore: Yes.

Mr. Jenckes: That is what you intend to do?

Mr. Fennemore: Yes.

Mr. Jenckes: I don't have any objection to the procedure on the thing from the standpoint of typing it over and submitting it. I, of course, have

an objection to the Court permitting him to [48] file it at all.

Mr. Fennemore: Well, I take it the Court has already ruled I might do it.

Mr. Jenckes: That is right, but, of course, in view of the fact we now have something tangible I'd like the opportunity to state our objection.

The Court: All right.

Mr. Jenckes: We would like to object to the amendment, particularly the first cause of action——

The Court (Interrupting): Well, I had better see it, I will know what you are talking about.

Mr. Jenckes: All right. I think for the purpose of this objection it will be agreeable with counsel, you are just substituting——

Mr. Fennemore (Interrupting): Paragraph 3 of the second cause of action.

Mr. Jenckes: I see. If you will look at that first cause of action, if your Honor please, it now changes the situation in this respect to where, in the original complaint it was alleged that we had, in effect, agreed to get insurance, and we had secured insurance. Now, in this one it appears that we have not secured insurance, and that is contrary to the evidence in the case, [49] and I don't think he should be permitted to amend the complaint where the evidence does not support it.

Mr. Fennemore: If the Court please, my motion this morning was to amend to conform with the evidence and to plead in the alternative. The contention of the insurance company is that the policy did not cover by its terms for various and sundry

reasons and, in the second place, there was certain provisions in the policy which were not complied with. Whether it did or did not cover is an arguable point that I would like to submit authorities on, but when confronted with the possibility that the Home policy, by its terms, did not cover this particular cotton as contended by the insurance company, I had to plead it that way in the alternative that the assured did not take the proper steps.

Mr. Jenckes: We are having a lot of hot and cold wind blown down our necks, if your Honor please, but I would like to know if I will have to put my coat on or turn the heat on, I don't know.

The Court: I don't see where it would alter the situation at all.

Mr. Fennemore: There is no contradiction [50] in the evidence.

Mr. Jenckes: Your Honor, please, the evidence is——

The Court (Interrupting): Well, that is all right. He can plead to as many causes of action in as many different ways as he pleases.

Mr. Jenckes: Not at this stage of the game, if your Honor please.

The Court: He can with the Court's permission conform with the evidence.

Mr. Jenckes: That is right, and that is just the point I am making, that it does not conform to the evidence, and it is clear from this policy that those particular bales were covered. Now, he comes in and says, "I want to plead to conform to the evidence." It does not conform to the evidence. The

evidence is that they issued a policy and it covered this cotton, all being the property of the insured, that was the Eloy Gin, or sold, but not delivered or removed. Now, if this cotton was not covered by that language or sold or not delivered and removed, then there is no way to right it, that is, upon changing the first cause of action, that it does not conform to the evidence, because it does appear that the policy was issued and it [51] appears in the specific language of the policy that it did cover.

The Court: Mr. McKesson does not agree to that.

Mr. Fennemore: Mr. McKesson says it was excluded from the provisions of the policy.

Mr. Jenckes: As far as Mr. McKesson is concerned, Eloy is the only one they are asking for judgment on this first cause of action. Apparently they are letting Mr. McKesson off the hock on the first cause of action. It says: "Wherefore, plaintiff prays judgment against Eloy Gin Corporation," so Mr. McKesson is not covered in this first cause of action.

The Court: Well, if it was not covered Mr. McKesson would be off the hock.

Mr. Jenckes: That is right, but the contract is not ambiguous, if your Honor please; it is subject to construction. It is quite clear that the contract did cover the cotton, so that I don't see how we can, even in the exercise of discretion, permit to amend not to conform to the evidence.

Mr. Fennemore: If the Court please, it still is not entirely clear to me that it does cover it. It is

in the insuring clauses, but from [52] the other clauses in the policy it might very well exclude it, and that is purely a question of law, because the contract is before your Honor and it is a question what the law on that point is, although I think the law might be somewhat in conflict even on that point.

The Court: Probably is. Well, I will allow the amendment.

Mr. Jenckes: Well, that is our objection so far as the first cause of action is concerned. Now, so far as the second cause of action is concerned, we object on the ground it is entirely a different cause of action that we were brought in here in the first place, that it is certainly a surprise to us that we are now to meet that charge, that we failed in our duty, apparently which counsel grabs out of thin air, to recover from the insurance company the insurance proceeds and to pay it over to Smith. Now, first of all, our objection is predicated upon the grounds that it is too late to make this amendment, that the statute of limitations has barred this cause of action. There certainly was not a contractual agreement on our part to pay that money over to or to collect it, so if it is a cause of action at all, it sounds in tort, and the longest period [53] of limitation that would possibly be effected would be the four-year statute—well, the four-year general statute or the two-year statute on generally a trespass. I think, also, there is a statute, if I am not mistaken, on negligence. I know the evidence, whichever the statute is applicable, is quite clear

that the cause of action is barred by limitations. Again, it is our contention that there has been no damage to the plaintiff in this case by virtue of any act of the Eloy Gin in failing to perform any contractual obligations that it might have had, for the reason that Smith was fully insured, and under the law this is not the kind of a case where Smith's insurer would be entitled to subrogation. There is no privity between Smith's insurer and Eloy Gin, and if we owe any duty from a contractual standpoint to Smith, that does not follow through to this insurer. The insurer does not have the benefit of that.

Mr. Fennemore: If the Court please, that second cause of action is upon the contract, the cause of action I raised which obligated them to place the insurance on, and they did, and by that they were obligated to collect it. I agree with Mr. Jenckes, in theory, based on any tort [54] obligation, is barred by any statute at this time.

The Court: I can't see from what I know of this case how the plaintiff can recover. He may be able to.

Mr. Fennemore: I will submit a brief on that, if your Honor please.

The Court: It is a little too tenuous for me to grasp from what I have heard, but I will allow these amendments if you want to make them.

Mr. Fennemore: Have you both rested?

Mr. Jenckes: As far as Eloy Gin is concerned, we rest.

Mr. McKesson: The insurance company rests.

The Court: All right.

Mr. McKesson: But I would like to make a motion.

The Court: You have been making motions all day.

Mr. McKesson: I have an amended Answer here now.

The Court: All right, go ahead.

Mr. McKesson: At this time, your Honor, please, in view of the fact that the Court has permitted the filing of the second amended complaint which, instead of covering one cause of [55] action now covers two causes of actions, the Home Insurance Company—I take it from the pleadings in the first cause of action, seeks no relief from the Home Insurance, but if it be inferred or is to be added to or anything else, we make motion for judgment for the Home Insurance Company as to the first cause of action. No judgment is requested in it. As to the second cause of action, we move for judgment for the Home Insurance Company on the ground and on the basis that the same fails to—it fails to state a claim against the Home Insurance Company, and further than that, that the second cause of action sounds in tort and arising out of a contract.

(Further argument between Court and counsel.)

Mr. McKesson: And upon the further ground we seek judgment on the ground that it is barred

by the statute of limitations, either the two-year or four-year statute. It does sound in tort and, therefore, this loss occurred on January 25th, 1946, more than four years and a half, and on the further ground that the uncontradicted evidence in this case shows that was a special contract which was admitted on stipulation, that Eugene B. Smith and Company, by their separate [56] contract, agreed with the Eloy Gin Corporation, that the Eloy Gin, the seller, should be responsible for any loss by fire until paid for. That means that the Eugene B. Smith and Company assumed the loss thereafter and the uncontradicted evidence is later it was paid for and delivered in accordance with the contract. There is absolutely no liability on the part of the Eloy Gin Corporation or the Home Insurance. Further than that, there is no evidence in this case showing any waiver on the part of the insurance company towards Eloy Gin is concerned or anybody else in this case, including Eugene B. Smith or its insurance carrier, so I submit, your Honor, on all those grounds we are entitled to judgment against Eugene B. Smith and Company.

Now, as to Eloy Gin Corporation, they have a counterclaim against us in saying that if judgment is rendered against them, they want one against us, and briefly, the pleadings in that state that the cotton that was insured and they had a fire insurance policy in effect and it was payable to them and that if they are liable to Eugene B. Smith, that we, in turn, should be liable to them, and I submit that the Eloy Gin Corporation, the cross-

complainant in this action [57] against the Home Insurance Company, has introduced no evidence and showing no right to recover under this cross-claim against us, and, further, the uncontradicted evidence shows in this case that they did not comply if there was insurance as far as they were concerned, and they were legally liable for it, that no Proof of Loss was filed for this particular insurance and there is no other extenuating circumstances and no action was brought within 12 months, or any other time until last Monday against us, so we move for judgment against the Eloy Gin Corporation on their cross-complaint.

The Court: All right, the motion will be denied at this time.

Mr. Fennemore: What about the time for filing a memorandum of authorities, your Honor?

The Court: What I am interested in is the plaintiff's theory of the case.

Mr. Fennemore: I suppose I had better start off briefing, then.

The Court: Yes.

Mr. Fennemore: Could I have 20 days on it?

The Court: Yes.

Mr. Fennemore: My principal legal assistant has got himself involved in a murder case and [58] I won't get any help out of him for a week or so.

The Court: All right. How much time do you want?

Mr. McKesson: Well, we might want more than 20, because we might be tied up on something else.

The Court: Well, I suppose it will be extended

eventually to three months. Well, 20, 20 and 10 to start with.

Mr. McKesson: All right.

Mr. Fennemore: All right.

(Thereupon the trial was ended at 2:30 o'clock p.m. of the same day.) [59]

I Hereby Certify that the proceedings had and evidence given upon the trial of this cause is contained fully and accurately in the shorthand notes taken by me of said trial, and that the foregoing 59 typewritten pages contain a full, true and accurate transcript of the same.

/s/ LOUIS L. BILLAR,

Official Shorthand Reporter.

[Endorsed]: Filed August 8, 1951.

PLAINTIFF'S EXHIBIT No. 2

In the District Court of the United States
for the District of Arizona

No. 1135, Civil

EUGENE B. SMITH & CO., INC.,

vs.

ELOY GIN CORPORATION and HOME IN-
SURANCE COMPANY

DEPOSITION OF T. S. McCORKLE

October 5, 1950

T. S. McCORKLE

being first duly sworn, examined in chief by Mr.
Grissom, testified as follows:

Q. What is your name, please, sir?

A. T. S. McCorkle.

Q. Where do you live, Mr. McCorkle?

A. Dallas; Dallas, Texas.

Q. What business are you in?

A. Cotton business.

Q. Are you conected with some organization en-
gaged in buying and selling cotton?

A. Yes, sir, I am engaged with Eugene B.
Smith & Company.

Q. What is the nature of that organization?

A. Merchants, buyers and sellers of cotton.

Q. What is the character of its organization?

A. It is a corporation incorporated under the
laws of the State of Texas.

Plaintiff's Exhibit No. 2—(Continued)

Q. What is its correct corporate name?

A. Eugene B. Smith & Co., Inc.

Q. Eugene B. Smith & Co., Inc., is that correct?

A. That is correct.

Q. Is that correct?

A. Yes, sir, that is correct.

Q. Do you know some of the history of that company? A. Yes, sir. [4*]

Q. When was it incorporated?

A. The firm of Eugene B. Smith & Company, Incorporated, was formerly Eugene B. Smith Industries, Incorporated, incorporated, I believe, in March, 1946. The name was changed to Eugene B. Smith & Co., Inc., on or about July 1st of that same year.

Q. Well now, do you recall whether or not Mr. Smith operated in some other way prior to the incorporation of this company?

A. Yes, sir, it was Eugene B. Smith & Company, was a proprietorship prior to the incorporation of this business.

Q. Well, was that a corporation, I mean, was that a partnership, or was it owned individually by Mr. Smith?

A. It was owned individually by Mr. Smith, that is correct.

Q. He didn't have any partners then?

A. No, sir.

Q. Were you connected in any way with Eugene B. Smith & Company, the proprietorship?

* Page numbering appearing at top of page of original Reporter's Transcript.

Plaintiff's Exhibit No. 2—(Continued)

A. For a number of years, yes, sir, I would say eight years—seven years, while it was a proprietorship, yes, sir.

Q. Well, do you mean continuously, or, from time to time? A. Continuously, yes, sir.

Q. When did Mr. Eugene B. Smith cease doing business as a cotton merchant under the name of Eugene Smith & Company, [5] proprietorship?

A. On June 1, 1946.

Q. What became of his assets and liabilities as a proprietorship at that time?

A. It was transferred over to the corporation—it was—the corporation took over the cotton business at that time.

Q. Well, were you connected with Eugene Smith & Company, the proprietorship, at the time of the incorporation as Eugene B. Smith & Company, Inc.?

A. Yes, sir, I was.

Q. Are you an official of the corporation?

A. Yes, sir, I am vice president of the company.

Q. How long have you been vice president of the company? A. Since its incorporation.

Q. What particular part of the business do you personally handle?

A. It is hard to say, I am in charge of the Dallas office of Eugene B. Smith & Company. My duties are varied.

Q. Well, you say Eugene B. Smith & Company, is that the corporation or the proprietorship?

A. Well, it is now the corporation, yes, sir.

Q. You mean since July 1, 1946, why you spoke

Plaintiff's Exhibit No. 2—(Continued)
of Eugene B. Smith & Company as Eugene B. Smith & Company, Inc.?

A. Yes, sir, as far as my duties, you asked me, my duties didn't change, except my title. [6]

Q. You have been manager of the Dallas office all along? A. That is correct.

Q. During the time you have been connected with it? A. That is correct, yes, sir.

Q. Now, when the corporation became Eugene B. Smith & Company, Incorporated, I believe you say that Mr. Smith transferred all of his assets and liabilities as a proprietorship to the company?

A. That is, everything connected with the cotton business was transferred to the corporation.

Q. What change, if any, took place in the operation of the business upon the incorporation of the company?

A. Only the name, only it was a corporation instead of a proprietorship, the operation did not change, it continued on.

Q. What happened to the bank accounts?

A. They were changed to the corporation, taken over by the corporation just as they were.

Q. How did Eugene B. Smith & Company, the proprietorship, carry its bank accounts, for instance?

A. The proprietorship carried its bank accounts as Eugene B. Smith & Company.

Q. Well, upon the incorporation of the company as Eugene Smith & Company, Inc., what happened to the bank accounts?

Plaintiff's Exhibit No. 2—(Continued)

A. They were changed to Eugene B. Smith & Co., Inc., [7] through the necessary steps, through advice to the bank by Mr. Smith, I believe, personally notified the banks that henceforth the bank accounts would be Eugene B. Smith & Co., Inc.

Q. If Eugene B. Smith & Company, the proprietorship, had contracts with reference to cotton at the time of the incorporation, what became of them?

A. They were taken over by the corporation just as they were.

Q. Do you know whether it is—the contracts of the proprietorship were carried out and executed by the corporation?

A. All executed by the corporation.

Q. Well, if Eugene B. Smith & Company, the proprietorship, owned receipts from gins and warehouses, what became of them?

A. They were transferred to the corporation, they became owned by the corporation at the same time.

Q. Do you know whether any formal written instruments of transfer were made from Eugene Smith, as Eugene B. Smith & Company, the proprietorship, to the corporation—how was that handled?

A. The only formal record that I know of was a simple bookkeeping entry. I don't know of any other, except that the records of the company were changed, that is, the necessary bookkeeping entries were made at that time.

Plaintiff's Exhibit No. 2—(Continued)

Q. You mean it just kept the same set of books and went [8] right on?

A. Oh, yes, that is correct. Well, I don't think it is the same set of books, we might have set up a new ledger, but it was done by the same book-keeping machine, and the accounts were set up as Eugene B. Smith & Co., Inc., accounts.

Q. State whether or not all of the assets, contracts of Eugene B. Smith & Company, the proprietorship, as cotton merchants, were taken over by the corporation?

A. They were, they were taken over, yes, sir.

Q. Now, this lawsuit, according to the pleadings, involves forty bales of cotton alleged to have been held under receipt from the defendant Eloy Gin Company in the name of Eugene B. Smith & Company in January, 1946. Do you recall what happened to those receipts?

A. Not of my own knowledge. I am told that there was a fire.

Q. Well, who handled that?

A. Mr. Churchill, our manager in Phoenix, it was handled through the Phoenix, Arizona, office.

Q. Was the Phoenix, Arizona, office in January, 1946, and up until July, 1946, in charge of Mr. Churchill? A. Yes, sir, that is correct.

Q. Do you know whether or not the incorporation of the proprietorship's business also included the proprietorship's operations in [9] Arizona?

A. Yes, sir, that is correct, they do.

Plaintiff's Exhibit No. 2—(Continued)

Q. Were the assets and liabilities of Mr. Smith, Eugene B. Smith, in Arizona, also handled in the same way?

A. Any such assets or liabilities in Arizona were the same as if they were anywhere else, yes, sir.

Q. Mr. Smith operates in a number of states?

A. Yes, sir, that is correct.

Q. You mean he did as a proprietor?

A. He did as a proprietor.

Q. And the corporation does now?

A. Succeeded to the same operation, yes, sir.

Q. Has there been any break in the handling of it?

A. No, sir.

Q. Since the incorporation?

A. No, sir.

Q. Now, these receipts, alleged, from the Eloy Gin Company, involving the cotton alleged to have been burned out there, you did not personally handle them, and don't have them here?

A. No, sir, I didn't.

Q. It was handled by Mr. Churchill?

A. Yes, sir, in Phoenix.

Q. If I understand it, you do know, though, that all of his cotton business was handled in that way?

A. That is correct, yes, sir. [10]

Q. And transferred over to the corporation?

A. That is correct.

Mr. Grissom: That is all.

Plaintiff's Exhibit No. 2—(Continued)

Cross-Examination

By Mr. Johnson:

Q. Mr. McCorkle, are you familiar with this contract of January 25, 1946, at all?

A. No, sir, I am not.

Q. Do you know of this purchase of some 1300 bales of cotton under that contract of January 25, 1946?

A. I don't recall it, no, sir.

Mr. Johnson: Mr. Reporter, I hand you an instrument Mr. Grissom has given me, and ask you to initial and mark that instrument.

(Said instrument marked Defendants' Exhibit Number 1.)

Mr. Grissom: Pardon me, since these are copies of each other, let us just use one of them, if you don't mind.

Mr. Johnson: All right.

Q. (By Mr. Johnson): I hand you a copy which has been marked Defendants' Exhibit 1, Number P-201, and ask you if you are familiar with that instrument?

A. Yes, I am familiar with the—I don't recall this transaction—it is one of many transactions, if I make [11] myself clear, I don't recall this particular transaction.

Q. Do you know that in that connection you had another contract number P-200, which covered 300 bales of cotton, in addition to this 1,000 which was also bought from the Eloy Gin Company?

Plaintiff's Exhibit No. 2—(Continued)

A. No, sir, I don't recall the transaction about it.

Mr. Johnson: Mr. Reporter, mark that as Defendants' Exhibit Number 2, and mark both sides of it, please.

(Said instruments marked Defendants' Exhibit Number 2, for identification.)

Q. (By Mr. Johnson): I hand you Defendants' Exhibit Number 2, and ask you if it does not bear the same date as Defendants' Exhibit Number 1, and the same parties to the contract?

A. Yes, sir, it appears to be similar.

Q. Are you familiar with the contract at all?

A. No, sir, only what I see now.

Q. Do you know that on that day they did buy, your company did buy, 1300 bales of cotton under orders numbers P-200 and P-201 from the Eloy Gin Corporation?

A. Only judging from those contracts, I don't recall the transaction, I would have to consult other records to substantiate that. It appears we did, yes, sir.

Q. Those are your confirmations on your confirmation forms? [12]

A. That is correct.

Q. And the blanks filled in are the usual and customary blanks, aren't they?

A. That is correct.

Q. And provide the usual and customary charges, method of payment, and so forth?

A. That is correct.

Q. And they are also in accordance with the

Plaintiff's Exhibit No. 2—(Continued)

Dallas Cotton Exchange contracts, aren't they?

A. To my knowledge, there is no Dallas Cotton Exchange contract.

Q. Well, there are certain rules of the Cotton Insurance Association?

A. Well, the customs of the trade, customs of the trade, I would say, but no Dallas Cotton Exchange contract. This is the Texas Cotton Association.

Q. I hand you the back part of Defendants' Exhibit 2, and ask you if the local rules of the Texas Cotton Association are not provided there? They are, are they not? A. That is correct.

Q. And also the back of Defendants' Exhibit 1?

A. Yes, sir; yes, sir.

Q. And there is nothing on the face of that contract that is not in conformity with those Texas rules of 1941 and 1942, is there? [13]

A. As far as the Texas rules are concerned, I believe they undergo some changes annually, I don't know that there would be any substantial change, but, this is a 1941 and 1942 form. I notice these are dated in 1945. I just mention that, not as being of any importance.

Q. In any event, that was a part of your contract at that time, being on the back of your confirmation order, Defendants' Exhibit 1?

A. I presume that is the rules under which it is bought. To my knowledge, we don't buy Arizona cotton under Texas rules, but that is what we appeared to do in this case.

Plaintiff's Exhibit No. 2—(Continued)

Q. Well, I call your attention to the fact that there is nothing on the face, the front page of that exhibit, which conflicts with the rules on the back, is there?

A. I don't know of anything, no, sir.

Q. I call your attention to, insurance at seller's risk until payment completed, that is proper, isn't it?

A. Let's see, "at seller's risk until payment completed." That is what it says.

Q. And that is proper?

A. That is the custom, yes, sir.

Q. When the payment is completed, then it is no longer at seller's risk? A. That is correct.

Q. Now, I will ask you whether or not you know whether [14] your company, Eugene B. Smith & Company, at or about that date of this contract, did not insure this very 1300 bales of cotton under policy number OC-58587, issued by the National Fire Insurance Company?

A. I don't recall this transaction, no, sir. I don't recall it. We normally insure cotton on the day we pay for it.

Q. Have you that policy with you, OC-58587?

A. I don't have it, I believe Mr. Grissom has it.

Q. Does Mr. Grissom have it, you think?

Mr. Grissom: They gave me a copy this morning. A. I brought a copy down.

Plaintiff's Exhibit No. 2—(Continued)

Mr. Grissom: I don't know whether it is that one, or not. This is in the Royal.

Mr. Johnson: The National.

A. I asked them to give me a copy of the one under which this particular cotton was insured.

Mr. Grissom: This is policy number 283588.

Q. (By Mr. Johnson): Will you make a search for the policy number OC-58587, and indicate to the Reporter within the immediate future whether you have such a policy in the possession of your company, and whether it was ever issued?

[I am informed that this loss occurred OC-58587 National Fire Insurance Co. and that Mr. Geo. Wright has copy. S.N.]

A. I will.

Q. And will you, at that time, give your answer, as a part of this deposition, under your oath?

A. I surely will, yes, sir. Let me make a record of [15] that number, please? That is the National?

Q. May I see the Royal policy, Mr. Grissom?

Will you tell me what this Royal insurance policy is and its number, and what it covers?

A. It is a lengthy coverage. The policy is number 283585.

Q. And the coverage?

A. The coverage is fire and lightning, extended coverage, and wind storm, hurricane, hail, explosion, riot, civil commotion—is that what you want?

Q. Have you made any claims, or accepted any

Plaintiff's Exhibit No. 2—(Continued)

payment under this National Insurance Company policy? A. I accepted a payment, yes, sir.

Q. What was that, how much?

A. I don't recall the amount.

Q. What did it cover?

A. It covered an advance, or loan, against the value of the cotton involved in this fire.

Q. This very policy?

A. I couldn't testify to that, I don't know. That is the policy the insurance agent gave me in connection with this claim, they may have given me the wrong one.

Q. In any event, you did receive a payment for insurance covering this very cotton involved in this suit?

A. We received—I said we received an advance, or a [16] loan in connection with this loss.

Q. You mean you signed a loan receipt to the insurance company involved, did you not?

A. That is my best recollection.

Q. And you accepted the payment for this very cotton?

A. Yes, sir, I accepted the check that they gave me, or the loan that they gave me on this claim.

Q. How much was that?

A. I don't recall the amount.

Q. Will you verify that when you get back to your office? A. Yes, sir. I will be glad to.

[Net payment was in the amount of \$4,736.85
S.N.]

Plaintiff's Exhibit No. 2—(Continued)

Q. And tell the Court Reporter, under the same terms by which we take your deposition, that is, under oath?

A. I will be glad to do that, yes, sir.

Q. Now, as a matter of fact, you did, if you can recall, receive the sum of \$4,736.85?

A. That amount seems about right for that type—for that number of bales at that time, the market price.

Q. Or did you receive \$4,028.61?

A. I couldn't answer that, I don't recall the amount.

Mr. Johnson: Mr. Reporter, I will have you mark this insurance policy Defendants' Exhibit Number 3, please.

(Said insurance policy marked Defendants' Exhibit Number 3.)

Mr. Johnson: In the event this Defendants' Exhibit [17] Number 3, Royal Insurance Company, Ltd., is not the policy under which you received your payment under a loan receipt, I will ask Mr. Grissom's permission to substitute the policy which you produce. That will be all right, won't it, Pinkney?

Mr. Grissom: Oh, I think so, I think we got the wrong one.

A. I was in a considerable rush today, and that is the one they handed me, and that is the one I brought.

Plaintiff's Exhibit No. 2—(Continued)

Mr. Johnson: Yes.

Q. (By Mr. Johnson): Now, do your books and records indicate when payment for this cotton involved in this fire was made?

A. The records indicate that, yes, sir.

Q. I believe the method of payment employed in this particular sale-purchase transaction was the surrender to the Valley Bank of these cotton receipts and the payment into the Valley Bank, by your company, that is true, isn't it?

A. I am not familiar with the exact procedure of how they take possession of cotton in Phoenix.

Q. Aren't you familiar with your company's procedure in Phoenix?

A. Not in detail, no, sir.

Q. Will you state whether or not it was a fact that a month before the date of this fire, by drafts drawn by Eloy Gin Company upon the Eugene B. Smith & Company, Incorporated, through the Valley National Bank, the payment for this cotton [18] was made?

A. I can't testify to that, I am sorry.

Q. Can you, by your books and records?

A. The books will disclose how the cotton was paid for, yes, sir.

Q. Will you go to your books and records and ascertain whether or not one month prior to the fire, that is, one month prior to January 25, 1946, a draft had been drawn upon Eugene B. Smith & Company through the Valley National Bank in accordance with contracts 200 and 201?

Plaintiff's Exhibit No. 2—(Continued)

A. I will have to obtain that from the Phoenix records. Unfortunately, that is not kept in Dallas.

Q. It won't show in Dallas?

A. No, sir, that won't show in Dallas.

Q. But it will show in Phoenix?

A. It should show on the Phoenix records.

Q. Who has those books and records in Phoenix at this time?

A. The Eugene B. Smith & Company office in Phoenix. May I say this?

Q. Wait a second. Okay.

A. Only the general books are kept in Dallas to reflect Phoenix business. The detail purchase records are kept in Phoenix and the Phoenix office pays for its own cotton through Valley National Bank, and is only reimbursed by the Dallas [19] office in big lots, so that is why I can't account for each individual transaction here.

Q. Well now, will not the books and records in Phoenix be the books and records of Eugene B. Smith & Company prior to incorporation?

A. Yes, sir, that is correct.

Q. And they will be there in Phoenix just as they are here, that is, for the proprietorship as well as for the incorporated company?

A. Well, yes, sir. As a matter of fact, there was no change in Phoenix at all. It is just on the same running record, only the general books were changed when it was incorporated, and they are kept in Dallas.

Q. They are kept in Dallas, you say?

Plaintiff's Exhibit No. 2—(Continued)

A. Yes, sir, the general books.

Q. But your books and records here will disclose the payment by the Royal Insurance Company, or the National Insurance Company, will it not?

A. Yes, sir, it will.

Q. And that, you will verify for me and tell Mr. Irby?

A. I will.

Q. That is, the amount you received from the insurance company from these identical 40 bales of cotton——

A. I will.

Q. And the date of payment? [20]

A. I will.

Q. And the means of the payment?

A. Yes, sir.

Q. And will you attach a policy, or a photostat of it, to this deposition?

A. I will be glad to do that, yes, sir.

Q. In place of Defendants' Exhibit Number 3?

A. Yes, I will do that.

Q. And also a photostatic copy of the loan receipt which the company signed?

[Attorney Geo. Wright has possession I am informed. S.N.]

A. If I can obtain that from the insurance company. I would have to ask the insurance company for that.

Mr. Grissom: I feel sure that is already in Phoenix. I have an idea the attorneys out there have it.

Q. (By Mr. Johnson): In any event, if you

Plaintiff's Exhibit No. 2—(Continued)

can get it, you will get it for me? A. Oh, yes.

Q. And you will ask your insurance agent to give you a photostatic copy of that loan receipt?

A. I will do that, yes, sir.

Q. What is his name?

A. Charles Williams is the agent.

Q. Here? A. Yes, sir.

Q. Where is his office? [21]

A. In the Cotton Exchange Building.

Q. And he carries your insurance——

A. He is an insurance broker, he places insurance. Actually, the Cotton Insurance Association, they have their office here, too, in charge of Mr. Williams and Dobbs.

Q. Did he place this insurance covering this cotton which was supposed to burn up January 25, 1946? A. Did he place it? Yes, sir, he did.

Q. Yes. A. Yes, sir, he did.

Q. And he is still handling your insurance?

A. That is correct.

Q. Now, can you also tell from your books and records when the receipts for all of this cotton were delivered and paid for?

A. The records of the Dallas office will not disclose that.

Q. And that will be disclosed in the Phoenix office, too?

A. Their records should be complete on that, yes, sir.

Q. So all you can give me from your books and records here is that insurance transaction?

Plaintiff's Exhibit No. 2—(Continued)

A. Well, except that we eventually paid for all of the cotton here, but not under any receipts, it went out under a bill of lading. If I make myself clear, we don't handle the receipts in this office, they were handled in Phoenix. [22]

Q. Well, will the bill of lading show any of that information?

A. I doubt it, the bill of lading would not identify that particular cotton.

Q. Would you attach your bills of lading to any cotton bought from the Eloy Company, from November 7, 1945, to January 25, 1946, to the deposition?

A. I am afraid I couldn't do that, because I don't recall where we shipped cotton from any gin company to ourselves. The cotton normally moved to Galveston, or to the mills in the eastern part of the nation, and it would be shipped in our own name, it would not be identified with any particular gin company.

Q. Wouldn't your bills of lading indicate from whom you purchased it?

A. No, sir, it would not, it would be probably from several purchasers. It is classed out there and shipped to the mills.

Q. So, your bill of lading would not identify any of this cotton at all?

A. I doubt that it would. I don't know of any instance where a bill of lading that we would issue here would identify this cotton, or any similar purchase.

Plaintiff's Exhibit No. 2—(Continued)

Q. Where was Jack Pritzer located? Do you know him?

A. I don't know the man, I know of him, but I don't know [23] him.

Q. An employee of the Eloy Company?

A. I only know that by what I have heard, I don't know him.

Q. You never insure any of your cotton, you say, until you have paid for it?

A. That is the normal procedure. Actually, that is when we report it. I don't know the insurance companies' viewpoint on that, as to when we are insured, and when we are not insured, but, from a practical standpoint, a cotton man considers his cotton insured when he has paid for it.

Q. So, if you had paid for this particular cotton, it would have been insured as your cotton by the insurance company, either the Royal, or the National?

A. Yes, sir, as we paid for it, that is correct.

Q. And, if you had already made payment a month before, then it would have been your cotton, and insured under the fire insurance contract with either the Royal or the National?

A. When we pay for it, we automatically cover it with insurance, yes, sir. We don't know of the existence of the particular cotton, because we only see the receipts, or paper representing a bale of cotton.

Q. And those receipts would have been received in your Phoenix office and not here?

Plaintiff's Exhibit No. 2—(Continued)

A. That is correct.

Q. And if they were received a month prior to this fire, [24] they were automatically covered under either the National or the Royal's policy?

A. Under our reporting method, that is correct, yes, sir.

Q. But the reporting would have been done by your Phoenix office, by Mr. Churchill?

A. The reporting would be done by the Dallas office, based on records furnished us by the Phoenix office.

Q. Now, can you give me copies of those records as to this particular cotton, from the Dallas office?

A. I presume I can supply that record, Mr. Charles Williams can supply it, I don't handle the reports, so I don't know just what the detailed procedure is on that. It is a very lengthy report, listing the purchases and location of our cotton.

Q. Will you give me the report, if you can get it from Mr. Williams, and attach it to this deposition? The report you made to your insurance company, either the Royal or the National, as to this particular cotton involved in this particular lawsuit?

A. If that is available to me, I will be glad to do that, yes, sir.

Q. Yes? A. I will ask for it.

Q. And, if you will, a photostatic copy, or the original of Number OC-58587, National Fire Insurance Company policy? [25]

A. Yes, sir.

Plaintiff's Exhibit No. 2—(Continued)

Q. And the reports which were made to the National Fire which would indicate this cotton was covered under that particular policy?

A. If I am correct, I believe the reports are made to the Cotton Insurance Association. I am not positive any report is made to any particular company. It is made to the Association, which handles our policy. Unfortunately, I am not familiar with the exact procedure.

Q. Let us attach that report to this deposition, too?

A. Whatever it is.

[Not available. S.N.]

Q. Whatever the report is, covering this particular 1300 bales of cotton under orders P-200 and P-201, November 7, 1945, you understand that?

A. Yes, sir.

Mr. Johnson: I believe that is all, thank you.

Redirect Examination

By Mr. Grissom:

Q. Let me ask him another question.

Now, if I understand your testimony, Mr. McCorkle, the details of the purchase of this cotton and the receipt by Eugene B. Smith & Company, was all handled by Mr. C. N. Churchill, Jr., a representative of Eugene B. Smith & Company in Phoenix? [26]

A. That is correct.

Q. Yes. Now, the date of those contracts of purchase there, what are they, June?

Plaintiff's Exhibit No. 2—(Continued)

A. November, I believe.

Q. The 1300 bales?

Mr. Johnson: November 7, 1945.

Mr. Grissom: Yes.

Q. (By Mr. Grissom): Now, would Eugene Smith & Company have received the receipts from the Eloy Gin Company in question before or after that instrument there is dated November 7th?

A. Afterward, that would be the normal procedure.

Q. Now, those receipts carry with them certain provisions?

A. I have never seen one of the receipts. A receipt usually carries it.

Q. They do, as a rule? A. Yes, sir.

Q. What these particular ones do, you don't know? A. I don't know, no, sir.

Q. As far as you know, they would be available in Phoenix? A. Yes, sir, that is correct.

Q. Now, about this provision with reference to——

A. Pardon me, the receipts might not be available in our office, if they have been canceled, they would be available to [27] the person issuing the receipts, just like a bank check, they go back to the person issuing.

Q. At any rate, you don't have them here, as I understand? A. No, sir.

Q. With reference to the provision of the insurance at seller's risk until payment completed, you don't know what provision there was on the

Plaintiff's Exhibit No. 2—(Continued)
receipts from the Eloy Gin Company?

A. No, sir, I don't know that.

Q. Nor the custom of Phoenix?

A. Well, the custom—no, sir, I don't know that, either.

Recross-Examination

By Mr. Johnson:

Q. What is the custom in Dallas?

A. I was just about to say, that that simply means that insurance covered by seller until paid for. We usually say here in Dallas, covered by seller until paid for, which means we pick up the insurance where he leaves off. When he gets his money, we insure it.

Q. Well, when he gets his money, he is paid then?

A. Yes, sir, when he gets his money, he is paid for the cotton.

Q. If he is paid by draft drawn on you, so far as you know, he has got his money?

A. That is correct. We have paid for it, [28] anyway.

Redirect Examination

By Mr. Grissom:

Q. You don't know what changes may have been wrought in the provisions of the receipt issued by the Eloy Gin Company?

A. No, sir, I am not familiar with that.

Plaintiff's Exhibit No. 2—(Continued)

Recross-Examination

By Mr. Johnson:

Q. But, this particular contract, on its face, provides for following the rules of the Texas Cotton Association, which are printed on the back and referred to as being on the back, that is right, isn't it?

A. That is what it appears. As I said, I never had considered that that cotton was bought under the rules of the Texas Cotton Association, it is merely a form, it is a contract between two dealers in cotton, and the rules applying, we very seldom consider those rules, except in cases——

Mr. Johnson: Wait a minute. Have you completed your answer?

A. Well, I don't know, I merely said that the face of the contract is the only thing that means anything to a merchant. The rules are there, but they have no part in that contract, they are simply put there for convenience. The contract is what is written on the face of it. Sometimes it is a little scrap of paper. It means the same thing. The terms of purchase; [29] sometimes there is no contract at all, but there is a purchase, nevertheless, a written contract.

Redirect Examination

By Mr. Grissom:

Q. You mean the cotton merchants——

Plaintiff's Exhibit No. 2—(Continued)

A. We buy many thousands of bales where there is no written contract ever executed.

Q. You may pick up one that the rules existed back years before?

A. That is right, that is a convenient form to confirm the contract to purchase.

Q. But it is the confirmation itself shown on the top side of the paper that you are interested in?

A. That is right, yes, sir. It never occurred to me whether it was a '41 or '50.

Recross-Examination

By Mr. Johnson:

Q. Nevertheless, this contract says on its face that you are going to follow the Texas rules as printed on the back, doesn't it?

A. That is what it says.

Q. It also says down at the bottom that this is the only understanding between the parties, and this is the understanding? [30]

A. That is what it says, yes, sir.

Redirect Examination

By Mr. Grissom:

Q. But you say, as between cotton merchants, that is the custom you use, the form available?

A. That is correct.

Q. And you do not consider yourself bound by the rules?

A. That is right, the rules in this case, I don't

Plaintiff's Exhibit No. 2—(Continued)

know as they would apply, or not apply. The Texas Cotton Association rules are supposed to apply against Texas cotton contracts. This is undoubtedly not a Texas cotton contract.

Q. It shows on its face there that it was issued in the State of Arizona? A. That is correct.

Q. And you see Mr. C. N. Churchill, Jr., signed as agent for Eugene B. Smith & Company, is he the Eugene B. Smith & Company representative in the State of Arizona? A. That is correct.

Q. That was Arizona cotton?

A. That is right, yes, sir.

Recross-Examination

By Mr. Johnson:

Q. But, you did have, at that time, a contract of [31] insurance through the Texas Cotton Association whereby all of the cotton that you had paid for and belonged to you was insured with the underwriter, which is the National Fire Insurance Company?

A. If you ask me if we had a contract with the Texas Cotton Association to insure, no, we didn't.

Q. No, I mean all of the cotton you had bought and paid for at any given date was insured through, that is, by means of the Cotton Insurance Association? A. Yes, sir.

Q. In a particular company, which, in this case, was probably the National Fire Insurance Company?

Plaintiff's Exhibit No. 2—(Continued)

A. Will you ask that question again, please?

Q. Well, at this time, you did have a policy of insurance that you got through the Texas Cotton Insurance Association?

A. Through the Cotton Insurance Association.

Q. That is the way you got it?

A. Yes, sir, through the Cotton Insurance Association.

Q. But the actual insurance was by a certain company, a certain fire insurance company?

A. That is right.

Q. And it was probably the National Fire Insurance Company, in this case, if it was not the Royal?

A. That is correct.

Q. You are not certain which company it was at this time, [32] but it was one of the two?

A. It appears to have been one of the two, yes, sir.

Q. And whichever one was the insurer of all of your cotton that you had paid for, and therefore owned, is the policy that you are going to attach to the deposition?

A. That is correct.

Q. Either the policy itself, or a photostatic copy, which will include all of the limits of liability and the riders, and everything else?

A. That is right.

Q. You will produce either the original——

A. I will attempt to get that, I will have to get that from the insurance people themselves.

[Understand Attorney Geo. Wright has possession. S.N.]

Plaintiff's Exhibit No. 2—(Continued)

Q. A photostatic copy indicating those things?

A. Yes, sir.

Mr. Johnson: That is all.

(Signature waived.)

Admitted October 27, 1950.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD
ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Eugene B. Smith & Co., Inc., Plaintiff, vs. Eloy Gin Corporation and Home Insurance Company, Defendants, numbered Civ-1135 Phoenix, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my

office in the city of Phoenix, State and District aforesaid.

I further certify that said original documents, and said copies of the minute entries, constitute the record on appeal in said case, in accordance with the Designations filed therein and made a part of the record attached hereto, and the same are as follows, to wit:

1. Complaint, filed January 12, 1948.
2. Defendant's Answer, filed March 9, 1948.
3. Plaintiff's Amended Complaint, filed September 27, 1950.
4. Motion to Dismiss and Separate Answer of The Home Insurance Co., filed September 28, 1950.
5. Separate Answer of Defendant Eloy Gin Corporation, filed September 28, 1950.
6. Minute entry of October 23, 1950.
7. Motion to Dismiss, Amended Answer and Cross-Claim of Eloy Gin Corporation, filed October 25, 1950.
8. Plaintiff's Second Amended Complaint, filed October 27, 1950.
9. Minute entry of October 27, 1950.
10. Plaintiff's Exhibits 1, 1-A, 1-B, 1-C, 1-D, 1-E, 1-F and 1-G, admitted and filed October 27, 1950.
11. Plaintiff's Exhibit 2, Deposition of T. S. McCorkle, admitted and filed October 27, 1950.
12. Motion to Dismiss and Plea in Bar, and Answer of Defendant Home Insurance Company to Plaintiff's Second Cause of Action in its Second Amended Complaint, filed November 3, 1950.

13. Minute entry of March 30, 1951.
14. Findings of Fact and Conclusions of Law, filed April 18, 1951.
15. Judgment, filed and docketed April 18, 1951.
16. Plaintiff's Motion for New Trial, filed April 27, 1951.
17. Minute entry of June 11, 1951.
18. Plaintiff's Notice of Appeal, Filed July 9, 1951.
19. Plaintiff's Bond for Costs on Appeal, filed July 9, 1951.
20. Order Extending Plaintiff's Time to File Record on Appeal and Docket the Appeal, filed July 20, 1951.
21. Reporter's Transcript, filed August 8, 1951.
22. Plaintiff's Designation of Contents of Record on Appeal, filed August 8, 1951.
23. Statement of Points on which Plaintiff Intends to Rely upon its Appeal, filed August 8, 1951.
24. Additional Designation of Contents of Record on Appeal Requested by Defendant, Home Insurance Company, filed August 10, 1951.

I further certify that the Clerk's fee for preparing and certifying this record on appeal amounts to the sum of \$4.00 and that said sum has been paid by counsel for the appellant.

Witness my hand and the seal of said Court this 11th day of September, 1951.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 13096. United States Court of Appeals for the Ninth Circuit. Eugene S. Smith & Co., Inc., a Corporation, Appellant, vs. Eloy Gin Corporation, a Corporation, and Home Insurance Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed September 13, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13096

EUGENE B. SMITH & CO., INC.,

Appellant,

vs.

ELOY GIN CORPORATION and HOME IN-
SURANCE COMPANY,

Appellees.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD TO BE
PRINTED

STATEMENT OF POINTS

Appellant intends to rely upon its appeal herein upon the points set forth in its "Statement of Points Upon Which Plaintiff Intends to Rely Upon Its Appeal" filed by it in the United States District Court for the District of Arizona (to which reference is hereby made) and included in the record transmitted by the Clerk of the United States District Court for the District of Arizona to the Clerk of the United States Court of Appeals for the Ninth Circuit.

Designation of Record to Be Printed

Appellant designates for printing herein the following portions of the record:

1. All pleadings except plaintiff's complaint filed

January 12, 1948; defendants' Eloy Gin Corporation and Home Insurance Company joint answer thereto filed March 9, 1948, and plaintiff's amended complaint filed September 27, 1950, omitting memoranda of authorities and notices of hearing.

2. Reporter's Transcript of evidence.

3. Plaintiff's Exhibit No. 2, deposition of T. S. McCorkle, omitting therefrom the cover page and pages 1, 2, 3 and 34 of the deposition.

4. Plaintiff's Exhibit 1, Stipulation of Facts dated October 24, 1950.

5. Plaintiff's Exhibit 1-A, contract No. P-200 dated November 7, 1945, for the purchase by Eugene B. Smith & Co. from Eloy Gin Corporation of three hundred bales of cotton.

6. One (1) gin yard receipt contained in plaintiff's Exhibit 1-C followed by a note in the following words:

“All of the 38 other gin yard receipts in this exhibit are the same as the foregoing, except for the number, the gross weight shown, the day of month and the name of the person following the direction ‘To Eloy Gin Corp.’ ”

7. Plaintiff's Exhibit 1-D Home Insurance Company fire insurance policy No. 6857.

8. Plaintiff's Exhibit 1-E National Fire Insurance Company marine fire insurance policy No. OC-58587.

9. Plaintiff's Exhibit 1-F loan draft issued by National Fire Insurance Company.

10. Plaintiff's Exhibit 1-G loan agreement executed by Eugene B. Smith & Co.

11. Findings of Fact and Conclusions of Law filed April 18, 1951.

12. Judgment filed and docketed July 18, 1951.

13. Plaintiff's Motion for New Trial filed April 27, 1951, and the Order denying the motion.

14. Minute entries of October 27, 1950, except entry showing filing of subpoena.

15. Plaintiff's Notice of Appeal filed July 9, 1951.

16. Plaintiff's Bond on Appeal filed July 9, 1951.

17. Order extending time to file record on appeal filed July 20, 1951.

18. Statement of points upon which plaintiff intends to rely upon its appeal filed August 8, 1951.

19. Plaintiff's designation of contents of record on appeal filed August 8, 1951.

20. This statement of points and designation.

21. Stipulation attached hereto.

FENNEMORE, CRAIG,
ALLEN & BLEDSOE,

By /s/ RICHARD FENNEMORE,
Attorneys for Appellant.

On the 15th day of September, 1951, I mailed a true and correct copy of the foregoing document to counsel for appellees, viz. one copy thereof to Messrs. Theodore G. McKesson and Robert H. Renaud, 403 Luhrs Tower, Phoenix, Arizona, and one copy to Messrs. Evans, Hull, Kitchel and Jenckes, 807 Title and Trust Building, Phoenix, Arizona.

/s/ RICHARD FENNEMORE.

[Title of Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated between appellant and appellees that in printing the record in the above-entitled matter there may be included one (1) gin yard receipt of the thirty-nine (39) in plaintiff's Exhibit 1-C followed by a note in the following words:

“All of the 38 other gin yard receipts in this exhibit are the same as the foregoing, except for the number, the gross weight shown, the day of month and the name of the person following the direction ‘To Eloy Gin Corp.’ ”

This stipulation is without prejudice to the right of appellees to designate additional portions of the record for printing as provided by the Federal Rules of Civil Procedure.

Dated September 14, 1951.

FENNEMORE, CRAIG,
ALLEN & BLEDSOE,

By /s/ RICHARD FENNEMORE,
Attorneys for Appellant,
Eugene B. Smith & Co., Inc.

THEODORE G. McKESSON,
ROBERT H. RENAUD,

By /s/ THEODORE G. McKESSON,
Attorneys for Appellee,
Home Insurance Company.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ JOS. JENCKES, JR.,
Attorneys for Appellee,
Eloy Gin Corp.

[Endorsed]: Filed September 17, 1951.

United States
Court of Appeals
For the Ninth Circuit

EUGENE B. SMITH & CO., Inc.,
a corporation,
Appellant,

vs.

ELOY GIN CORPORATION, a corpora-
tion, and HOME INSURANCE COM-
PANY, a corporation,
Appellees.

Appellant's Opening Brief

FENNEMORE, CRAIG, ALLEN & BLEDSOE
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Phoenix, Arizona

Attorneys for Appellant

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OF COUNSEL

FILED

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United States
Court of Appeals
For the Ninth Circuit

EUGENE B. SMITH & CO., Inc.,
a corporation,

Appellant,

vs.

ELOY GIN CORPORATION, a corpora-
tion, and HOME INSURANCE COM-
PANY, a corporation,

Appellees.

No. 13096

Appellant's Opening Brief

**STATEMENT OF PLEADINGS AND FACTS
DISCLOSING JURISDICTION**

Eugene B. Smith and Co., Inc., a corporation, plaintiff below, hereinafter referred to as "Smith Corporation" is a corporation organized under the laws of the State of Texas. Defendant Eloy Gin Corporation, a corporation, hereinafter referred to as "Eloy" is a corporation organized and existing under the laws of the State of Arizona. Defendant Home Insurance Company, a corporation, is a corporation organized and existing under the laws of the State of New York. (T. R. 34, 35, 69)

The amount in controversy is in excess of three thousand dollars (\$3,000.00). (T. R. 36, 38, 69)

The District Court had jurisdiction under the provisions of Title 28, U.S.C.A., Section 1332, page 257. Judgment adverse to appellant Smith Corporation was rendered by the United States District Court for the District of Arizona (T. R. 54) and this Court has jurisdiction upon this appeal to review the said judgment under the provisions of Title 28, U. S. C. A., Section 1291, page 230.

STATEMENT OF THE CASE

On November 7, 1945, Eloy as seller and Eugene B. Smith, hereinafter called "Smith", an individual doing business as Eugene B. Smith and Co., as buyer entered into two written contracts by which Smith agreed to buy and Eloy to sell a total of thirteen hundred (1300) bales of cotton, upon the terms set forth in said contracts. (T. R. 74) Each of said written contracts contained the following provision:

"INSURANCE at sellers risk until payment completed.

REIMBURSEMENT Sight Draft, gin-yard receipts attached, also Smith/Doxey cards, Draw on Eugene B. Smith & Co., care Valley National Bank, Phoenix." (T. R. 70)

Each of said contracts was completed in full accordance with its terms. As cotton was ginned and baled, the bales were marked and gin yard receipts issued for each bale, the gin yard receipts being issued by Eloy to Eloy and thereafter, sight drafts were drawn on Smith care Valley National Bank, Phoenix. The gin yard receipts were endorsed in blank by Eloy, attached to the sight drafts and as the drafts were

paid, the gin yard receipts were delivered by the Valley National Bank to Smith. The bales of cotton remained in the possession of Eloy until removed from its possession by surrender of the gin yard receipts and delivery of the cotton to the one presenting the receipts. All of said cotton was paid for in accordance with the terms of said agreements and all delivered and the gin yard receipts surrendered with the exception of forty (40) bales.

On January 25, 1946, a fire occurred at the gin yard of Eloy and of the forty (40) bales of cotton for which Smith had gin yard receipts and on which delivery had not been taken and the receipts surrendered, thirty-nine (39) were destroyed in the fire. (T. R. 70-71)

Each of the gin yard receipts so held by Smith contained the following provision:

“THIRD: That said bale of cotton has been insured, while stored as aforesaid under this receipt against direct loss and/or damage by fire except as limited and provided in insurance policy covering same”.

On August 1, 1945, Eloy had secured a policy of insurance from The Home Insurance Company (T. R. 79) covering

“merchandise held in trust * * * * or left for storage * * * * but loss shall be adjusted with and payable to the insured” (Eloy)

and which also provided that

“This policy insures Eloy Gin Corporation. Loss, if

any to be adjusted with the insured named herein and payable to insured." (T. R. 83)

which policy was in full force and effect on the date of the fire, January 25, 1946. (T. R. 72)

As of August 1, 1944, Smith effected a policy of fire insurance with National Fire Insurance Company of Hartford, Connecticut (T.R. 104) covering, except as otherwise provided in the policy,

"The risks of loss or damage to all cotton in bales * * * * while owned by the assured * * * * by fire * * * *" (T.R. 92)

Said policy further provided:

"This policy does not cover the following * * * *

(c) Cotton for which the Assured is liable as warehouseman or other bailee, or for which the Assured is liable to any person, firm or corporation. This insurance shall never inure to the benefit of any carrier, bailee or any person, firm or corporation other than the Assured, except that payments may be made as provided for in Section 9 above.

(d) Cotton for which any carrier or other bailee is liable, or cotton under bills of lading or storage receipts that give the carrier, warehouseman or other bailee the benefit of any insurance thereon, or cotton on which any carrier or other bailee has insurance which would attach if this policy had not been issued, or insurance which would, under any circumstances, inure to the benefit of the Assured hereunder." (T. R. 98)

Said policy further provided in paragraph 8 of the provisions relating to payments or advances in case of loss that:

“After presentation of proofs of loss or damage to cotton described in Section 1 of this form (and not excluded hereunder) while in possession of any carrier or other bailee, this Company, provided the provisions of this policy have been complied with, will advance as a loan to the Assured the amount of such loss or damage, repayable only to the extent of any recovery from such carrier or bailee.”

Said policy was on the date of the fire, January 25, 1946, in full force and effect. (T.R. 72)

After the fire Eloy failed to make any proof of loss to The Home Insurance Company covering the thirty-nine (39) bales of cotton, relying upon the advice of the adjuster representing The Home Insurance Company in adjusting the loss that the cotton was not covered by the policy. (T.R. 140)

After the cotton was destroyed by fire, National Fire Insurance Company advanced to Smith the sum of four thousand eight hundred sixty-seven and 43/100 dollars (\$4,867.43) by its loan draft, which stated that said

“sum is advanced as a loan repayable only to the extent of any net collection we may make from any carrier, bailee or others on account of loss to forty (40) bales of cotton due to fire at Eloy, Arizona on or about January 25, 1946”. (T.R. 72, 120)

and in consideration of said advance Smith executed under date of February 18, 1946, a receipt which contained the following provision:

“Received from National Fire Insurance Co. the sum of Four Thousand Eight Hundred Sixty-Seven and 43/100 Dollars as a loan and repayable only to the extent of any net recovery we may make from any carrier, bailee, or others, on account of loss or damage to cotton in bales, our property, due to fire at Eloy, Arizona, on or about the 25th day of January, 1946, or from any insurance effected by any carrier, or bailee, or others, on said property.” (T. R. 122)

Thereafter, as of July 1, 1946, Smith transferred his cotton business to appellant, which took over the assets, liabilities and contracts of Smith in connection with his cotton business. (T. R. 172-173)

Thereafter, appellant brought this action for the recovery of the value of the cotton destroyed in the fire. During the trial the plaintiff offered to show the custom of the trade with respect to payment of insurance charges after the first twenty (20) days (T. R. 133-134) the gin receipts (T. R. 77) being silent as to this, but the Court refused to admit the testimony upon defendants' objection. After adverse judgment (T. R. 54) and denial of motion for new trial (T. R. 57) appellant gave notice of appeal to this Court (T. R. 58), filed its appeal bond (T. R. 58) and thus the case comes before this Court on appeal.

The Court below entered its judgment (T. R. 54) based upon Findings of Fact and Conclusions of Law

which denied appellant recovery against Eloy upon two grounds:

First, that Smith suffered no loss in that he was reimbursed and indemnified by loan receipts by National Fire Insurance Company (Finding IV T. R. 51).

Second, that by his contracts of purchase with Eloy covering cotton hereininvolved, together with other cotton, he had relieved Eloy from liability for cotton paid for in the event of fire (Finding IV, V, T. R. 51 and Conclusion of Law (5) T. R. 53-54).

SPECIFICATIONS OF ERROR

POINT I

The Court below was in error in finding that Smith suffered no loss as he was reimbursed in that payment under the loan receipt reimbursed and indemnified him.

POINT II

The Court below was in error in holding that by his contracts of purchase with Eloy covering the cotton hereininvolved, he had relieved Eloy from liability for cotton paid for in the event of fire.

POINT III

The evidence being uncontradicted, the Court below was in error in not finding that by the delivery of warehouse receipts covering the cotton in question, Eloy became a warehouseman as to Smith and by the terms of the warehouse receipts was obligated to in-

sure the cotton and was therefore liable to appellant either because the insurance which Eloy obtained did not cover the cotton, or if it did cover the cotton, then because of its failure to make the necessary steps to collect the insurance.

POINT IV

The Court below was in error in refusing to admit testimony as to the custom of the trade with respect to billing for insurance charges after the first twenty (20) days.

ARGUMENT

POINT I

The Court was in error in finding that the payment to appellant by National Fire Insurance Company was reimbursement and indemnification which would prevent the maintenance of an action against Eloy. The payment was admittedly made under a loan receipt as a loan to be repaid only to the extent of recovery from any bailee or others on account of the loss by fire. The leading case establishing the right to maintain an action against the bailee or others where payment is made by an insurer under such an agreement is *Luckenbach vs. W. J. McCahan Sugar Refining Company*, 248 U.S. 139, 39 Supreme Court 53. In that case a shipment had been lost at sea while on a common carrier under a bill of lading providing that the carrier should, to the extent of its liability, have the full benefit of any insurance that may have been effected on the goods. Shipper had full insurance under a policy which, however, provided that the assured warranted the insurer free from any liability for merchandise in

the possession of a carrier liable for any loss or damage thereto and for merchandise shipped under a bill of lading containing a stipulation that the carrier might have the benefit of any insurance thereon. Notwithstanding this provision, the insurance company advanced the shipper the amount of the loss under a loan agreement in substance the same as the one involved here and the shipper thereupon brought suit against the carrier. The Supreme Court, in holding the shipper was not barred from maintaining the action, cites as follows:

“Upon delivery of this and similar agreements, the shipper received from the insurance companies, promptly after the adjustment of the loss, amounts aggregating * * * * the loss; and this libel was filed in the name of the shipper, but for the sole benefit of the insurers, through their proctors and counsel, and wholly at their expense. If, and to the extent (less expenses) that, recovery is had, the insurers will receive payment or be reimbursed for their so-called loans to the shipper. If nothing is recovered from the carrier, the shipper will retain the money received by it without being under obligation to make any repayment of the amounts advanced. In other words, if there is no recovery here, the amounts advanced will operate as absolute payment under the policies.

Agreements of this nature have been a common practice in business for many years. *Pennsylvania Railroad Co. vs. Burr*, 130 Fed. 847, 65 C.C.A. 331; *Bradley vs. Lehigh Valley Railroad Co.*, 153 Fed. 350, 82 C.C.A. 426. It is clear that if valid and enforced according to their terms, they accomplish

the desired purpose. They supply the shipper promptly with money to the full extent of the indemnity or compensation to which he is entitled on account of the loss; and they preserve to the insurers the claim against the carrier to which by the general law of insurance, independently of special agreement, they would become subrogated upon payment by them of the loss. The carrier insists that the transaction, while in terms a loan, is in substance a payment of insurance; that to treat it as if it were a loan, is to follow the letter of the agreement and to disregard the actual facts; and that to give it effect as a loan is to sanction fiction and subterfuge. But no good reason appears either for questioning its legality or for denying its effect. The shipper is under no obligation to the carrier to take out insurance on the cargo; and the freight rate is the same whether he does or does not insure. The general law does not give the carrier, upon payment of the shipper's claim, a right by subrogation against the insurers. The insurer has, on the other hand, by the general law, a right of subrogation against the carrier. Such claims, like tangible * * * salvage, are elements which enter into the calculations of actuaries in fixing insurance rates; and, at least in the mutual companies, the insured gets some benefit from amounts realized therefrom. It is essential to the performance of the insurer's service, that the insured be promptly put in funds, so that his business may be continued without embarrassment. Unless this is provided for, credits which are commonly issued against drafts or notes with bills of lading attached, would not be granted. Whether the transfer of money or other thing shall operate as a payment, is ordinarily a matter which is determined by the intention of the

parties to the transaction. Compare *The Kimball*, 3 Wall. 37 44, 18 L. Ed. 50. The insurer could not have been obliged to pay until the condition of their liability—i. e., nonliability of the carrier—had been established. The shipper could not have been obliged to surrender to the insurers the conduct of the litigation against the carrier, until the insurers had been paid. In consideration of securing then the right to conduct the litigation, the insurers made the advances. It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice.”

To the same effect is *Dixey vs. Federal Compress and Warehouse Company* (C.C.A. 8) 132 Fed. (2) 275.

We submit that the Court below was clearly in error on the authority of these cases in holding that payment by the National Fire Insurance Company under the loan agreement was in anywise a bar to an action by appellant against Eloy.

POINT II

The Court below was in error in holding that Smith by his contracts of purchase assumed liability for the destruction of the cotton by fire after payment therefor. The purchase contracts (T. R. 74) provide

“INSURANCE at seller’s risk until payment completed”

but contain no provision with respect to insurance after payment is completed.

Had there been no further contracts between the parties the conclusions reached by the Court below might be justified by implication, or by the rule that in the absence of anything to the contrary, buyer stands risk or loss after passage of title, but the contracts (T. R. 74) also provide for

“REIMBURSEMENT Sight Draft, *gin-yard receipts attached*” (Emphasis supplied)

At the time of the fire Smith had paid for the cotton involved here and held the receipts therefor. (T.R. 71-72). These receipts (T. R. 77-78) were negotiable warehouse receipts, each covering one (1) bale of cotton, which was deliverable by the terms thereof to Eloy or order and were endorsed in blank by Eloy and delivered to Smith. (T. R. 70-71)

Section 52-831, Arizona Code of 1939, provides in part:

“A negotiable receipt may be negotiated by delivery ; * * * * whereby the terms of the receipt the warehousman undertakes to deliver the goods to the order of a specified person and such person * * * * has endorsed it (the receipt) in blank”.

Section 52-834, Arizona Code of 1939, provides in part:

“A person to whom a negotiable receipt has been duly negotiated acquires thereby * * * * the direct obligation of the warehouseman to hold possession of the goods for him *according to the terms of the receipt* as fully as if the warehouseman had con-

tracted directly with him". (Emphasis supplied)
 The delivery of the gin receipts to Smith constitute therefore, negotiation to him and thereby he acquired the obligation of Eloy to hold the cotton for him *according to the terms of the receipt*, as fully as if Eloy had contracted directly with him.

The purchase contract (T. R. 74) was executed in November and the gin receipts (T. R. 77-78) were executed in December following. Even if the purchase contracts (T. R. 74) should have contained an express provision, which they did not, that insurance was at buyer's risk after payment completed, the later contracts evidenced by the negotiated gin receipts would have been controlling.

First Mortgage Bond Homestead Ass'n. vs. Nelson, 151 Md. 181, 135 A. 139, in which case the Court cites and applies the general rule as follows:

"Where there are several contracts in the same matter of different dates or when one is plainly intended to supersede the other, the latter will control. So if there is a plain repugnancy between the provisions of an original contract and those of a supplemental one between the same parties and relating to the same subject-matter, the earlier contract must yield to the later as far as the repugnancy extends. 13 C. J. 529".

POINT III

On the uncontradicted evidence the Court below should have found that by the delivery of warehouse receipts covering the cotton in question, Eloy became a warehouseman as to Smith and by the terms of the

warehouse receipts was obligated to insure the cotton and was therefore, liable to appellant either because the insurance which it obtained did not cover the cotton, or if it did cover the cotton, then because of its failure to take the necessary steps to collect the insurance.

We therefore, submit that Smith is entitled to the contractual obligation of Eloy to insure the cotton contained in paragraph THIRD of the gin receipts. (T. R. 77-78)

Under the facts of this case Eloy, having contracted with Smith to insure the stored cotton, is liable for the loss whether it did or did not in fact secure the insurance thereon. If it did not secure the insurance covering the cotton, it is liable for breach of the contract contained in the warehouse receipts. The rule is thus stated in 67 C. J. 512, paragraph 116:

“A warehouseman’s contract to procure fire insurance covering stored goods is enforceable, and he will be held liable for damages flowing from its breach, and the fact that the warehouseman was guilty of no negligence with respect to the fire damage will not exonerate him from liability for the burning of uninsured goods * * *”

In the case of *Gay vs. Davidson*, 216 Ky 424 287 S. W. 931, the Court, speaking with reference to a contract to insure by a warehouseman, states the rule to be:

“It is well settled that a contract of this character is enforceable and where such contract exists, if no

insurance is taken out by the warehouseman and the property stored is destroyed by fire, the builder (bailor?) may have an action for its value."

To the same effect,

Rochelle Gin and Cotton Co. vs. Fisher 13 Ga. App. 621, 79 S. E. 584

Farmers Ginnery and Manufacturing Co. vs. Thrashers 144 Ga. 598, 87 S. E. 804

Keller vs. Smith 59 Minn. 203, 60 N. W. 1102

On the other hand, if the Home Insurance policy did cover the cotton hereininvolved, then Eloy is liable for the loss because of its admitted failure to take steps to collect the insurance.

In the case of *Farney vs. Hauser*, 109 Kans. 75, 198 Pac. 178, the Court states the rule in the following language at page 181:

"Defendants' final contention is that they should not be charged with their failure to collect insurance on plaintiff's wheat. They do not appear to question the general rule that where a warehouseman takes out a policy of insurance to protect his own interest in property and that held in trust by him, or concerning which he may have a liability, it is his duty to claim and collect such insurance not only for a fire loss on his own property but also for the loss sustained by the owner of the property intrusted or bailed to him. Such, of course, is the general rule. *Home Ins. Co. vs. Baltimore Warehouse Co.* 93 U. S. 527, 23 L. Ed 868 and Rose's notes thereto at page

442 et seq. And it is also settled that the failure of the warehouseman to collect such insurance renders him personally liable therefor to his customer or bailee. *Southern Cold Storage, etc. Co. v. A. F. Dechman & Co.* (Tex. Civ. App. 1903) 73 S. W. 545; *Johnston vs. Charles Abresch Co.* 123 Wis. 130, 101 N.W. 395, 68 L. R. A. 934, 107 Am. St. Rep. 995, See also 27 R. C. L. 955-958".

Similarly, in 67 C. J. 514, paragraph 118, the rule is stated as follows:

"A warehouseman insuring stored goods which are subsequently burned is under a duty to make the necessary claim and proof of loss to the insurance company, and is liable to the depositor for failure to collect insurance due to default of the warehouseman, and, where a warehouseman takes out insurance sufficient to cover both its interest and that of the depositor, and unnecessarily settles for less, it will be responsible to the depositor."

POINT IV

Testimony as to the custom of the trade with respect to billing for insurance charges should have been admitted. The proffered testimony would have shown that it was the custom to bill for insurance charges after the first twenty (20) days at the warehouseman's convenience, and to the extent that defendants may claim either lack or failure of consideration for the agreement to insure the proffered testimony should have been admitted.

Jones vs. Chaffin 102 Ala. 382, 15 S. 143

*Planters' Gin and Warehouse Company vs. Pitts
Banking Co.* 24 Ga. App. 731, 102 S. E. 183

We therefore submit that it is immaterial whether the Home Insurance policy covered this cotton or not. In either case, Eloy Gin Corporation would be liable for the loss.

Respectfully submitted,

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United States
Court of Appeals
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Appellant,

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PANY, a corporation,

Appellees.

Appellee's Home Insurance
Company Reply Brief

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United States
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Appellees.

No. 13096

Appellee's Home Insurance
Company Reply Brief

STATEMENT OF THE CASE

The original complaint in this action was filed January 12, 1948, the Amended Complaint September, 1950 and the Second Amended Complaint filed at the time of trial at the request of the appellant with the Court's permission.

The only complaint before the Court is the Second Amended Complaint (T.R. 34).

The appellee's Home Insurance Company, Motion to Dismiss, plea in bar and answer of cross defendant to cross claim to appellant's two causes of action of the

Second Amended Complaint, is the one in which we are concerned in this appeal (T.R. 43).

This action originally and at all times, has been an action on a contract and not in tort. Originally judgment was sought against Eloy Gin Corporation and Home Insurance Company. After the amended complaint was filed, issues were changed and counsel for the Home Insurance Company advised the Eloy Gin Corporation of the diversity of interests. Separate pleadings were filed and the Eloy Gin Corporation sought and employed separate counsel that represented the Eloy Gin Corporation at the trial.

After the appellant had introduced the stipulation of facts and the Exhibits thereto attached (T.R. 69) the Home Insurance Company, appellee was entitled to Judgment in its favor on the first amended complaint and the cross complaint of Eloy Gin Corporation.

However, the appellant sought to inject into the issues, extraneous matter pertaining to custom of the trade on insurance premiums and then asked leave of Court to file a Second Amended Complaint to conform to the evidence which was granted and the second amended complaint was filed and thereupon the Appellee, Home Insurance Company filed its motion to dismiss, pleas in bar and answer to the second amended complaint.

The issues are simple. The Eloy Gin Corporation was engaged in several lines of business during the times mentioned in said complaints, as follows:

A. Planting, growing and harvesting of cotton.

B. Financing farmers to secure business for the gin.

- C. Buying and selling cotton for its own account.
- D. Ginning cotton and issuing bale receipts.

During the times mentioned, while it was so engaged in these various enterprises, the appellant's predecessor, bought 1300 bales of cotton from the Eloy Gin Corporation upon the terms and conditions set forth in plaintiff's Exhibit No. 1A, (T.R. 74).

The Court at the time of trial, did not limit his findings of fact and conclusions of law to the two items set forth in appellant's opening brief, Page 7.

The Court did not find that it was illegal to recover on loan receipts but on the contrary held that in this case the appellant, Eugene B. Smith Company had a policy of fire insurance on its cotton with the National Fire Insurance Company and was not entitled to recover for and in behalf of itself or the National Fire Insurance Company for the reason that the appellant Eugene B. Smith and Company, on the contract above referred to had relieved Eloy Gin Corporation from liability in event of fire on cotton which Eugene B. Smith had paid for prior to fire. (Findings 3, 4, 5, 6, 7, T.R. 50-51).

SPECIFICATIONS OF ERROR

(Assigned by Appellant)

POINT I

The Court below was in error in finding that Smith suffered no loss as he was reimbursed in that payment under the loan receipt reimbursed and indemnified him.

POINT II

The Court below was in error in holding that by his contracts of purchase with Eloy covering the cotton here involved, he had relieved Eloy from liability for cotton paid for in the event of fire.

POINT III

The evidence being uncontradicted, the Court below was in error in not finding that by the delivery of warehouse receipts covering the cotton in question, Eloy became a warehouseman as to Smith and by the terms of the warehouse receipts was obligated to insure the cotton and was therefore liable to appellant either because the insurance which Eloy obtained did not cover the cotton, or if it did cover the cotton, then because of its failure to make the necessary steps to collect the insurance.

POINT IV

The Court below was in error in refusing to admit testimony as to the custom of the trade with respect to billing for insurance charges after the first twenty (20) days.

ARGUMENT

POINT I

The Court did not find that Smith suffered no loss as he was reimbursed in that payment on the loan receipt as the Court's finding of fact No. 4 (T.R. 51) is as follows:

"Eugene B. Smith & Co., Inc., suffered no loss by reason of the destruction of said 39 bales of cotton

by fire, as it was reimbursed and indemnified by loan receipts for said loss by its insurance carrier, National Fire Insurance Company, and had by its *written agreement relieved Eloy Gin Corporation from any liability for any cotton on Eloy Gin Corporation's gin yard that had been paid for in the event of fire.*

In other words, the Court in effect held that by virtue of a special agreement that the appellant Smith had with Eloy, he had relieved Eloy from any responsibility to the appellant for cotton that it had bought and paid for prior to a fire, in accordance with Exhibit No. 1A (T.R. 74)

Therefore, the citations cited by the appellant under this point, although good law, are not applicable as the appellant or the National Fire Insurance Company cannot recover for something that the appellant had relieved Eloy from insuring the cotton against loss by fire where the cotton had been paid for prior to fire.

The Court in Findings of Fact No. 5 (T.R. 51) recognizes the legality of the loan receipt and the right to recover on tort and contract actions in the name of the appellant or National Fire Insurance Company but not where the appellant has made contracts contrary thereto.

We submit therefore, that appellant is clearly in error in attempting to seek any reversal based upon any decisions cited by it in the opening brief.

POINT II

The Court below was not in error in holding that the appellant Smith had by his contracts of purchase, assumed liability for the destruction of cotton by fire

after payment therefor. The purchase contracts (T.R. 74) provide for "insurance at seller's risk until payment completed."

We do not follow the appellant's argument in stating that the Court's findings of fact and conclusions of law were correct except that there was another deal or contract entered into subsequent to the original contracts referred to (T.R. 74).

The citations and the laws of Arizona employed by appellant in the opening brief, Page 12-13, under Point II, are clearly not in point and not applicable to this situation.

We refer the Court briefly to the deposition of T. S. McCorkle, one of Smith's officers, a portion of which is as follows:

"Q. Well, I call your attention to the fact that there is nothing on the face, the front page of that exhibit, which conflicts with the rules on the back, is there?

A. I don't know of anything, no, sir.

Q. I call your attention to, insurance at seller's risk until payment completed, that is proper, isn't it?

A. Let's see, "at seller's risk until payment completed." that is what it says.

Q. And that is proper?

A. That is the custom, yes, sir.

Q. When the payment is completed, then it is no longer at seller's risk?

A. That is correct. (T.R. 177)

and again in the deposition of Mr. McCorkle,

“Q. You never insure any of your cotton, you say, until you have paid for it?

A. That is the normal procedure. Actually, that is when we report it. I don't know the insurance companies' viewpoint on that, as to when we are insured, and when we are not insured, but, from a practical standpoint, a cotton man considers his cotton insured when he has paid for it.

Q. So, if you had paid for this particular cotton, it would have been insured as your cotton by the insurance, company, either the Royal or the National?

A. Yes, sir, as we paid for it, that is correct.

Q. And, if you had already made payment a month before, then it would have been your cotton, and insured under the fire insurance contract with either the Royal or the National?

A. When we pay for it, we automatically cover it with insurance, yes, sir. We don't know of the existence of the particular cotton, because we only see the receipts, or paper representing a bale of cotton.” (T.R. 186).

POINT III

Appellant's third point is chiefly pointed at the liability of Eloy Gin Corporation. We wish to point out that the plaintiff's second amended complaint covers two causes of action, the first against the Eloy Gin Corporation only; the second cause of action against both the Eloy Gin Corporation and the defendant Home Insurance Company in the alternative, attempting to show a waiver of failure of Eloy Gin Corporation to make proof of loss and bring suit within one year as provided in said policy of insurance. (T.R. 79).

In fact the appellant's final contention on the second amended complaint was to seek recovery against the Eloy Gin Corporation for failure to collect and recover insurance from the Home Insurance Company within the time provided by law by reason of the fact that there were 39 bales of cotton on the Eloy Gin Corporation's yard that had not been picked up by the appellant prior to the fire, (being a part of the 1300 bales) and all paid for several months prior to the fire.

We wish to further point out that the gin yard receipt following the agreement that it had made with the appellant corporation in selling the 1300 bales, issued the gin receipts to *itself* on *itself* and then had delivered them together with grade cards to the Valley National Bank with sight draft attached, in accordance with Exhibit No. 1A (T.R. 74).

We maintain that the Eloy Gin Corporation under no circumstances could be held liable to the appellant where such contracts had been made.

The gin yard receipt further showed that some agreement other than a warehouse contract was in existence between the appellant, Smith, and the Eloy Gin Corporation, for the amount of money to be paid for storage insurance were left blank on all gin receipts and there was no insurance paid by the appellant Smith or any other person.

POINT IV

Pertaining to testimony of custom of the trade on insurance, the gin yard receipts referred to (T.R. 77) show no insurance was charged appellant Smith and the testimony of Churchill shows no such custom as

contended for in Point IV and the evidence was not admissible to prove that by virtue of the fact that some blank should have been filled in, in the gin receipt or that there was a new agreement made between Smith and Eloy contrary to the one set forth in (T.R. 74).

Appellant, in Paragraph 12 of the second amended complaint (T.R. 39) is pointed chiefly at the Eloy Gin Corporation but in the alternative judgment is sought against the Home Insurance Company by a waiver of the failure of the defendant Eloy Gin Corporation to make proof of loss or bring suit within one year as provided in said policy of insurance.

The appellant, Smith, in said second cause of action of the Second amended complaint (T.R. 39) failed to plead necessary facts that set forth a waiver as provided by the rules of the Court.

In addition thereto, appellant introduced no evidence of any waiver on the part of the Home Insurance Company or any of its agents.

As a matter of fact, the appellant, in the opening brief, presented no law or facts why the Judgment of the Court should be reversed as to the Home Insurance Company.

As has been pointed out, appellee's, Home Insurance Company, policy did not inure to the benefit of Smith. As the second amended complaint failed to state a cause of action and no evidence was introduced or offered to prove any liability of the Home Insurance Company to the appellant, the Court properly made the findings of fact and conclusions of law as set forth (T.R. 49-53).

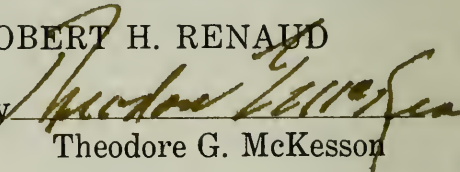
We therefore submit that the appellant has prosecuted a frivolous appeal and has caused the Home Insurance Company to incur attorneys fees and costs in this appeal and therefore prays that the Court affirm the decision of the Judgment of the lower Court (T.R. 54) and order the appellant to pay the appellee, Home Insurance Company, damages for a frivolous appeal in such amount as the Court may deem fit and proper under the circumstances.

Respectfully submitted,

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No. 13096

IN THE
United States
Court of Appeals
For the Ninth Circuit

EUGENE B. SMITH & Co., INC.,
a corporation,

Appellant,

vs.

ELOY GIN CORPORATION, a corporation,
and HOME INSURANCE COMPANY, a corporation,

Appellees.

BRIEF OF APPELLEE,
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No. 13096

**BRIEF OF APPELLEE,
ELOY GIN CORPORATION**

STATEMENT OF THE CASE

The "Statement of the Case" contained in Appellant's brief appears to be fair. Any additional facts which we deem pertinent will be adverted to in our argument. We will deal with each specification of error submitted by appellant but not in the order presented. Our purpose will be to show in logical order why, under any view of the facts, the trial court would not have been warranted in entering judgment against Eloy Gin Corporation. As did counsel for appellant, we will, for purposes of convenience, refer to appellant Eugene B.

Smith & Co., Inc., as “Smith”, to its insurance carrier, National Fire Insurance Company as “National”, to appellee Eloy Gin Corporation as “Eloy”, and to appellee Home Insurance Company as “Home”.

SUMMARY OF ARGUMENT

I.

Eloy was not obligated to maintain fire insurance on Smith’s cotton at the time the same was destroyed by fire. (Appellant’s points 2 and 3.)

II.

Smith has no right of action against Eloy to the benefits of which National is entitled upon the theory of subrogation. (Appellant’s point 1.)

III.

Smith, for itself or National, has no right of action against Eloy growing out of Eloy’s failure to collect and remit proceeds of the Home policy. (Appellant’s points 1 and 3.)

IV.

The custom of the trade with respect to gin charges for storage or insurance is immaterial and irrelevant. (Appellant’s point 4.)

ARGUMENT

I. ELOY NOT OBLIGATED TO INSURE.

(Appellant’s points 2 and 3)

Counsel for Smith tactily concede that under the terms of the purchase contract between Smith and Eloy—“Insurance at seller’s risk until payment completed.”—Eloy assumed no obligation to insure the

cotton after payment. Counsel argue that the gin receipts issued by Eloy constituted new agreements between the parties which changed Eloy's obligation in this respect.

The court will bear in mind that the relationship between Eloy and Smith was that of vendor and purchaser. To facilitate the sale it was agreed that payment for the cotton would be made by "sight draft, gin-yard receipts attached." (T.R. 74) As cotton was ginned Eloy issued to itself yard receipts (T.R. 77). This, of course, created no obligation to anyone and was not so intended. It was merely a convenient method of identifying each bale of cotton. Obviously, Eloy had no intention of charging itself for storage and insurance and therefore the receipts were not completed with respect thereto. As Smith paid for the cotton, Eloy delivered the receipts to him pursuant to the original agreement. Presumably Smith was taking delivery "in lots of not less than 100 B/C, as fast as ginned and cards obtained." (T.R. 74). Between the time any receipt was delivered to Smith and the time that he surrendered the same upon receiving the bale of cotton identified by such receipt, Eloy was acting (as would any other vendor under like circumstances) as a gratuitous bailee. The reference to insurance in the receipts could not be deemed to impose upon Eloy a duty to insure or keep the cotton insured for any period of time subsequent to payment for the reasons: (a) the original agreement between the parties was to the contrary; (b) the receipts were not completed as to storage and insurance charges; (c) there was no intent to vary the terms of the original agreement; and (d) there was no consideration for any commitment by Eloy to insure.

Had the parties intended that Eloy would, for a consideration, act as a warehouseman of Smith's cotton and assume all obligations implicit in its warehouse receipts, Eloy would have issued and Smith would have accepted receipts requiring Smith to pay storage and insurance charges. The circumstances of this case lead only to the conclusion that Eloy was, as a vendor, holding cotton (the title to which had passed to Smith) pending delivery pursuant to the agreement of purchase and sale. The rights of the parties must be determined in the light of that agreement. It cannot be reasonably contended that such agreement imposed any obligation upon Eloy to maintain insurance on the cotton after receipt of payment.

II. NO RIGHT OF SUBROGATION.
(Appellant's point 1)

If we assume that Eloy was obligated to insure Smith's cotton and failed so to do, it is nevertheless undisputed that Smith did so himself. Smith is in exactly the same position as the intervener, W. D. Striplin, in the case of *Harwood-Yancey Co. v. Lawrenceburg Warehouse Co.*, 167 Tenn. 14, 65 S.W. 2d 192; cert. den. 292 U.S. 645, 78 L. ed. 1496; 54 S.Ct. 779. The court said:

“After the destruction of his cotton aforesaid, W. D. Striplin received a sum of money equivalent to its value from his general insurer. This sum of money was paid to W. D. Striplin in pursuance of a written obligation on his part to treat said sum as a loan to be repaid, however, only upon the collection by him of damages for the loss of his cotton from defendant. This paper writing also contained an assignment to his insurer of the intervener's claim against defendant and agreement on intervener's part to make claim against defendant for the loss of the cotton and, in the event of failure to promptly collect to enter suit for said

claim against said defendant and to conduct said suit under the direction and advice of the insurer.

“We think the Court of Appeals properly dismissed the intervening petition of *W. D. Striplin* upon authority of *Lancaster Mills v. Merchants’ Cotton-Press Co.*, 89 Tenn. 1, 14 S.W. 317, 331, 24 Am. St. Rep. 586, and *Deming & Co. v. Merchants’ Cotton-Press Co.*, 90 Tenn. 306, 17 S.W. 89, 13 L. R. A. 518.

“The situation presented in those cases was this: The defendant had undertaken to keep the cotton fully insured. This agreement was breached. The cotton was destroyed by fire. The owners of the cotton, carrying general policies on all their cotton, received from their insurers amounts equivalent to their losses; these sums being received under the guise or form of loans as here. This court treated the loans as payments by the owners’ general insurers and pointed out that the defendants in those cases were not liable primarily for the destruction of the cotton but were only liable for a breach of their contract to insure the cotton. It was said:

“‘As the assured did for itself just what the compress company agreed to do for it, and having no right of action save for premiums, its insurer, who has paid the loss, has none.’ *Lancaster Mills v. Merchants’ Cotton-Press Co.*, supra.

A like conclusion was reached in *Deming v. Merchants’ Cotton-Press Co.*, supra.

“While the court in those cases treated the so-called loans by the owners’ insurers as payments, it does not seem to be material whether the action of the intervener’s insurer here in placing in the owners’ hands a sum of money equivalent to the loss be treated as a payment or as a loan. There was to be no repayment by the owner to the insurer unless there was recovery from the warehouse company. The intervener had no right of action against the warehouse company for the value of the goods.

His right of action was for a breach of contract on the part of the latter to insure the cotton. For such breach the warehouse company was liable for damage sustained by the intervener. He has sustained no damage except the cost of the premium on the policy issued by his general insurer. As long as he retains the sum of money received from his insurer, the intervener has no right of action against the warehouse company for lack of insurance. There is then, as said in the previous decisions, no right of action to which the intervener's insurer could be subrogated, save a suit for the amount of the premium aforesaid.

"We do not regard *Luckenbach v. McCahan Sugar Refining Co.*, 248 U.S. 139, 39 S. Ct. 53, 54, 63 L. Ed. 170, 1 A.L.R. 1522, as in conflict with the former decisions of this court. In that case there was a primary liability on the part of the carrier for the value of goods lost through its negligence. * * * "

As pointed out by the Supreme Court of Tennessee, the case of *Luckenbach v. W. J. McCahan Sugar Refining Co.*, 248 U.S. 139, 63 L. Ed. 170, 39 S. Ct. 53, 1 A.L.R. 1522, relied upon by appellant, is authority only for the proposition that an insurer who has paid a claim may be subrogated to the rights of the insured against a person who is primarily responsible for the loss. Here Eloy is not charged with liability for a loss growing out of its negligence. It is merely charged with breach of contract which resulted in no damage to Smith.

III. NO CAUSE OF ACTION FOR FAILURE TO COLLECT INSURANCE PROCEEDS.
(Appellant's point 3)

If we further assume that Eloy was obligated to insure and that the Home insurance policy covered Smith's cotton, then counsel for appellant contend that Smith has a cause of action against Eloy because

of its failure to collect the proceeds and remit to Smith. It seems obvious that if Smith has no cause of action for Eloy's alleged *failure* to obtain insurance, then *a fortiori* no cause of action could arise out of Eloy's *obtaining* the insurance. In each case the answer is that Smith has suffered no loss. Smith has been indemnified by National (whether as a loan or payment is immaterial), and no right of subrogation exists in the absence of Eloy's liability for the loss arising from negligence.

In the case of *Friedman v. Woods Motor Vehicle Co.* (CCA 7) 123 Fed. 413, the Seventh Circuit held that:

“The owner of goods, destroyed by fire while in storage with other goods owned by the warehouseman, is not entitled to recover a portion of the insurance collected by the warehouseman on general policies covering all goods for which he was liable, without showing that he has not been indemnified for the loss by other insurance.”

In the case at bar it is undisputed that plaintiff has been indemnified by National. Under the circumstances it cannot recover herein for the reason—as stated by the Seventh Circuit: “The absence of other insurance is a condition upon which alone relief could be granted.”

Counsel for appellant rely upon *Dixey v. Federal Compress & Warehouse Co.* (CCA 8) 132 F. 2d 275.

In that case the warehouse company had insured the owner's cotton. Regulations issued by the Secretary of Agriculture imposed upon the warehouseman the duty of collecting the insurance proceeds, in the event of loss, and paying over the same to the owners. The warehouseman failed to do so and the action was instituted by the owner after its insurance carrier had paid for

the loss under a loan receipt similar to that involved in the case at bar. The court took the view that the owner had not received payment for his cotton and that the action would lie. The decision resulted from a misunderstanding of the scope and effect of the *Luckenbach* case. As pointed out by the Supreme Court of Tennessee in the *Harwood-Yancey* case, *supra*:

“In *Luckenbach v. McCahan Sugar Refining Co.*, the carrier, under a primary obligation for the loss of the goods, sought to escape that primary obligation by the device of inserting into its bill of lading a provision that it should have the benefit of any insurance effected. To meet this effort of the carrier, to keep the primary liability where the law placed it, the insurer adopted the loan device approved by the court. The decision of the Supreme Court sanctioned this effort of the insurer and the decision seems to rest largely on grounds of policy.

“As heretofore pointed out, the situation of the parties in the case before us and the nature and order of their liabilities are altogether different.”
(65 S.W. 2d 196)

The *Dixey* decision did not result in a judgment against the warehouse company. Upon demand its insurer was named a party defendant and the court apportioned the loss equally between the two insurance companies. In the second opinion (*Dixey v. Federal Compress & Warehouse Co.* (CCA 8) 140 F. 2d 820, 822) the court stated with respect to plaintiff's contention that he should have had judgment against the warehouse company:

“It is true that on the first appeal to this court we held that the plaintiffs had sufficiently pleaded a cause of action against the warehouse company for that company's refusal to take proper steps to

collect from its insurer. But after the remand that insurer was duly proceeded against and was compelled to respond to the extent of its liability. Therefore no damage accrued to plaintiffs from the mere refusal to proceed on the part of the warehouse company, originally relied on by plaintiffs. No negligence in respect to the fire was charged against the warehouse company and we find no merit in the first point argued."

In the case at bar, Eloy's insurer (Home Insurance Company) is a defendant. If Smith's insurer (National Fire Insurance Company) is entitled to contribution from Home, the latter can be compelled herein to respond to the extent of its liability. Under the circumstances, no action lies against Eloy.

Counsel for Home will contend that any right of action against it has been lost by reason of the failure of Smith, National, or Eloy to file proofs of loss and institute an action within the time limited by the policy (T.R. 80). If this contention be sustained, there is still no basis for imposing liability upon Eloy. There is nothing in the record to support the conclusion that Eloy prevented Smith from filing proofs of loss or instituting an action against Home within the proper time.

It is well settled that where an insurance policy covers bailor's goods, the bailor may, in the event of loss, sue the insurance company directly, particularly where the bailee fails or refuses to collect the proceeds on behalf of the bailor and even where the policies are payable to or adjustable with the bailee only.

Hamblet v. Buffalo Library Garage Co., Inc.
(S. Ct. N.Y.) 225 N.Y.S. 716

Insurance Co. of North America v. U. S.
(CCA 4) 159 F. 2d 699.

Millers National Ins. Co. v. Bunds,
158 Kans. 662, 149 P. 2d 350.

Richartz, et al. v. Martin, et al.,
252 Wis. 108, 31 N.W. 2d 158,

Anno. 61 A.L.R. 720.

If Smith was in a position to institute an action against Home, it cannot now charge Eloy with any loss which it may have sustained by reason of the failure of Eloy so to do. As pointed out in the Restatement of the Law of Contracts: "Damages are not recoverable for harm that the plaintiff should have foreseen and could have avoided by reasonable effort without undue risk, expense or humiliation" (A.L.I., 1 Contracts 535, paragraph 336). This principle is illustrated in the Restatement by the following exmple:

"A contracts to obtain insurance for B against liability for injuries caused by B's automobile. With knowledge that A has broken his contract, B drives his automobile, injuries C, and has to pay heavy damages to C. B could easily have obtained such insurance from another agent before driving his machine. B's recoverable damages against A do not include the damages paid to C." (ibid. 538).

In the case at bar, Smith could easily have instituted the action against Home within the proper time and avoided any alleged loss.

We submit that in any event Home is not in a position to take advantage of the limitation contained in its policy. The undisputed evidence is that Home's agent (Mr. George K. Bolt of the General Adjustment Bureau), with full knowledge of the facts — and acting upon the advice of Home's attorney — prepared the proof of loss which was executed and presented by Eloy to Home (T.R. 139-141). Smith's cotton was

not included in the proof of loss because Home advised Eloy that it was not covered by the policy. Home made the decision that it was not liable for the loss of Smith's cotton and its attorney undertook to defend on behalf of both Eloy and Home when this action was instituted (T.R. 145-146). Under the circumstances, Home waived all conditions of the policy with respect to presentation of proofs of loss and institution of suit. It is well settled that a limitation in a policy as to the time when suit must be brought may be waived by the insurance company. Such waiver may be oral; it may also be either express or implied or the insurer by its conduct may be estopped from asserting the limitation. And such a waiver may be inferred from the acts of the insurer or its authorized representatives (20 Appleman, Insurance Law and Practice 326).

In the case of *Arlotte v. National Liberty Insurance Company*, 312 Pa. 442, 167 Atl. 295, the court held that an insurer was bound by its agent's representations that damage to an insured building was not covered by the policy and precluded the insurer from setting up as a defense insured's failure to furnish proof of loss or institute proceedings until a year after loss. In reliance upon the representations of Home's agent that Home was not liable for the loss of Smith's cotton, Eloy failed to take any further action in the matter. Under the circumstances, Home is not now in a position to rely upon the limitation contained in its policy.

IV. CUSTOM OF THE TRADE. (Appellant's point 4)

Counsel for appellant argue that testimony as to the custom of the trade with respect to billing for insurance charges should have been admitted. It is apparently counsel's position that by reason of custom of the trade Smith was obligated to pay Eloy insurance

and storage charges accruing after the first twenty days of storage and that such obligation constituted consideration for Eloy's alleged promise to insure.

The lower court did not err in refusing to admit testimony as to the alleged custom of the trade with respect to billing for insurance charges. The testimony was wholly immaterial and irrelevant.

“ * * * A custom or usage will not be admitted where the evidence does not tend to show any intention on the part of the parties to contract with reference thereto and nothing can be gathered from the surrounding circumstances to lead to the conclusion that they did rely on it. * * * ” 25 C.J.S. 110, Sec. 21.

As we have pointed out in subdivision I of this brief, all of the facts and circumstances surrounding the transaction between Smith and Eloy lead to the conclusion that there was no intent that Eloy, after payment for the cotton, should act as other than a gratuitous bailee. Eloy did not intend to charge Smith for storage and insurance and as a matter of fact made no such charge. Any question of custom and usage is completely beside the point.

CONCLUSION

This action was instituted solely and exclusively for the benefit of National. A judgment for or against Smith will not change its financial status one cent. It is an attempt by National to have another insurer (Home) bear or share the loss. Eloy was injected into the case purely as a tactical move. We submit that neither principles of law nor legal gymnastics require that Eloy shoulder a loss for which it is not alleged to be responsible and for which its vendee has been indemnified. Whether or not National may be entitled

to contribution from Home does not affect Eloy. Eloy is not guilty of any act or omission which has deprived National of any such right. Furthermore, it cannot be reasonably contended that Eloy was obligated at any time or in any way to National.

The lower court found that Eloy had no duty to maintain insurance upon Smith's cotton at the time it was destroyed and that National has indemnified Smith for its loss. Such findings are consonant with the evidence and will not be disturbed by this court. Such findings support the judgment for Eloy Gin Corporation which should be affirmed.

Respectfully submitted,

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United States
Court of Appeals
For the Ninth Circuit

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a corporation,

Appellant,

vs.

ELOY GIN CORPORATION, a corpora-
tion, and HOME INSURANCE COM-
PANY, a corporation,

Appellees.

Appellant's Reply Brief

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FILED

JAN 28 1952

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vs.

ELOY GIN CORPORATION, a corporation,
and HOME INSURANCE COMPANY, a corporation,

Appellees.

No. 13096

REPLY BRIEF OF APPELLANT

Eloy, in its brief, has raised one point which needs reply. Eloy asserts that appellant was entitled to sue upon the Home policy, although by its terms the loss, if any, was to be adjusted with the named insured and payable to the insured, Eloy. (T. R. 83)

To this there are two answers. First, that as noted in the case of *Richartz vs. Martin*, 252 Wisc. 108, 31. N.W. (2) 158, and the annotation 61 A.L.R. 720 cited by Eloy (Brief 10) the cases hold both ways, and second, the position simply adds up to a plea that appellant failed to take steps to mitigate the damages and not having affirmatively pleaded this (R. T. 23-26) the defense is not available to Eloy.

Federal Rules of Civil Procedure
Rule 8 (c)

25 C.J.S. 780
Section 142

Pittman Construction Co. vs. Ellis 39 Ga. App. 490
147 S.E. 420

McDaniel Brothers vs. Wilson (Tex. Civ. App) 70
S.W. (2) 618

Other points raised by Eloy are covered by our
opening brief.

Respectfully submitted,
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Petition for Rehearing
On Behalf of Appellant

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No. 13096

PETITION FOR REHEARING ON BEHALF OF
APPELLANT

Appellant respectfully petitions the Court for a rehearing in the above cause upon the ground that the opinion of the majority of the Court is erroneous both in fact and law.

Because of the very important economic implications of the majority opinion, which we will point out in conclusion, we have made a more detailed analysis of the majority opinion than is normally done in a petition for rehearing (References to the opinion are to the pages of the printed opinion furnished by the Clerk of this Court).

The basic question before the Court is whether or not the thirty-nine (39) gin yard receipts, which on their faces purport to be negotiable warehouse receipts, should be enforced according to their express terms. The majority says not because it concludes that they were not intended to be used "for other than identification purposes". (Op. 3), i.e. they were not intended by the parties to be negotiable contracts which they purported to be. In support of this conclusion the majority gives the following reasons which we follow with our statement as to why we conceive the reason to be in error. For convenience the original contract will be referred to as "contract" and the gin yard receipts as "receipt".

- 1 - "We think reference to gin-yard receipts in the contract was in connection with the technique of reimbursement adopted by the parties and in that connection only." (Op.2)

We submit that the fact that the reference to gin-yard receipts in the contract was in connection with the technique of reimbursement only, can have but little, if any, bearing upon the legal effect to be given to the receipts actually delivered, particularly in view of the fact that the receipts, on their faces, purport to be negotiable warehouse contracts.

- 2 - "Its use signifies a convenient means to enable the purchaser to acquire possession and control of the cotton." (Op.2)

This is true, but inasmuch as the receipt, if construed as an enforceable negotiable contract, would be a still more convenient means to enable the purchaser to acquire possession and control, we submit that its use for that purpose does not negative or tend to negative an intent that the receipt be effective in accordance with its terms.

- 3 - "The receipts contained a space for unpaid charges and following the line which read '(1) Ginning, Bagging and Ties, Storage and Insurance for first twenty days \$ ' Eloy wrote 'Pd', indicating its realization that the forms were essentially being used for a purpose that was inappropriate since the depositor and receiver of the cotton were, at the time of issuance of the receipt, the same entity." (Op.2-3)

The majority has here overlooked the following evidence in the record:

- "Q. Now, each of these documents show at (11) the bottom, has a notation 'Ginning, Bagging and Ties, Storage and Insurance for first 20 days,' marked 'paid'. For whom are they paid and how?

* * * * *

- A. The first 20 days insurance is normally and usually paid by the producer or the farmer, the customer of the gin.

Mr. Fennemore: That is the custom of the trade?

A. *That is the custom of the trade of all gins in Arizona so far as I know.*" (emphasis supplied) T. R. 129

The "pd" was placed in the blank not as an indication that Eloy realized the forms were inappropriate but to evidence the actual fact that the producer, in accordance with "the custom of the trade of all gins in Arizona", had paid the insurance for the first 20 days.

4 - "The fact is that Eloy used a standard form of gin-yard receipt whose literal provisions were inapplicable to this transaction because of the express agreement as to insurance." (Op. 3)

We respectfully submit the Court is here in error because the only *express* statement in the contract was "Insurance at sellers risk until payment completed". After payment the contract was silent. The receipt says the cotton has been insured while stored. If before payment that agrees with the *express* words in the contract. If after payment it is not in conflict with any *express* words in the contract.

5 - "If the agreement Smith contends for was in effect, it is difficult to understand why the receipts were not couched in terms of charges to be levied and insurance made effective from the time payment was made for the cotton, in accordance with the terms of the contract of sale, rather than in terms of a 20-day period." (Op. 3)

As we have shown under 3 above, the receipt contained the 20 day "pd" period because the producer had paid for the first 20 days.

6 - "Smith made no showing as to its practice in the use of the receipts, that is, whether in selling the cotton it purchased it would use the mechanism of endorsing the receipts over to its purchaser. On the contrary, the only suggestion in the record is that when the cotton purchased from Eloy was sold Smith sent it out under bills of lading, which negatives any intended use of the receipts for other than identification purposes". (Op. 3)

If we understand this language correctly what the majority is here saying is that before the holder of a receipt, which on its face purports to be a negotiable contract, can enforce it according to its terms, he must first show that it was his practice to actually negotiate the receipts, and that in default of such showing it will be presumed that the receipts were only for identification—and not what they purported to be—negotiable enforceable contracts. We submit that this is an entirely novel doctrine in Anglo-American jurisprudence and we further submit that the unilateral practice or intent of Smith cannot determine whether the receipts were or were not contracts.

II

The balance of the opinion of the majority commencing at the bottom of page 3 appears to be directed to corroborating the conclusion previously reached that these receipts were not intended as negotiable contracts in accordance with their express terms, but merely as "no risk" parking tickets for identification only.

Paraphrased, these are the points raised by the majority and the answers thereto:

(A) The custom at Dallas, not controlling at Phoenix, assists in determining *Smith's* purpose in limiting Eloy's liability to time of payment. (Op. 4)

A - (1) In the field of contracts unilateral purpose or intent is immaterial.

(2) The provision as to insurance did not *limit* Eloy's liability. If no such provision had been made Eloy would not have stood the risk of loss after payment because concurrently with payment the receipt was delivered to Smith and the property (title) in the goods passed. Under the Uniform Sales Act (Sec. 52-524, Arizona Code, 1939) the goods are at buyer's risk when the property therein is transferred to buyer, whether delivery has been made or not. But, had Eloy unconditionally appropriated the bales of cotton to the performance of the contract before payment, the property would thereupon pass to Smith. Uniform Sales Act (Sec. 52-518, Arizona Code, 1939). There was bound to be a lapse of time between the unconditional appropriation by endorsing the receipt, making out and attaching the draft, transmitting it to the Valley Bank at Phoenix and payment being made there. Consequently, the provision *in* the contract did not *limit* but *extended* Eloy's liability.

- (B) If Smith relied on Eloy to furnish insurance why is there no evidence that Smith paid for insurance on the other 1260 bales? (Op. 4)

A - (1) If there was a *contract* for insurance after payment on these 39 bales what was or was not done on the other 1260 bales is immaterial. If there was no contract it is still immaterial.

- (C) If Smith's contention is correct, it is *reasonable to assume* that Eloy would have billed and Smith paid insurance costs *at time of delivery*. (Op. 4)

A - (1) Appellant offered to prove (T.R. 133) that insurance charges by the custom of the trade were billed at some date after delivery and that Smith and Eloy understood that this practice would be followed in connection with these transactions and had bills been rendered they would have been paid. The proffer was rejected (T.R. 134) and the failure to allow the evidence proffered was made a point upon appeal (T.R. 62) and a specification of error (Appellant's Brief, p. 8). In the face of this proffered evidence why is it reasonable to assume something to the contrary?

- (D) Why did not Smith rely on gin receipts to protect it against loss *before* payment? (Op. 5)

A - (1) Before payment the gin receipt had not been delivered to Smith. Even appel-

lant does not claim that the receipt, negotiable in form, could give Smith any rights until delivery to it.

(E) Smith carried insurance which protected it after payment (Op.6).

A - (1) As pointed out in the dissenting opinion (Op. 8) Smith's policy excluded "cotton on which any * * * bailee has insurance which would attach if this policy had not been issued * * *" (T.R. 98). Does the majority opinion mean to hold that the Home Insurance policy did not cover this cotton? This point was not discussed in the briefs nor covered in the oral argument and before the Court so holds, it should have the benefit of complete presentation by counsel.

(F) Smith did not intend to pay a *double* insurance premium for insurance carried by Eloy. (Op. 6)

A - (1) As noted under (C) above Smith offered evidence to show that under the custom of the trade, in the light of which the two parties contracted, it was obligated to and would or did pay insurance charges when billed by Eloy. (T.R. 133). Should this Court approve the rejection of the proffered evidence and then, from the absence of it in the evidence admitted in the record, say that the contrary is true? We submit that it should not.

(G) The proffered evidence was immaterial. (Op. 6)

A - (1) The foregoing discussion, we submit, shows that it was material.

This petition is overlong and for that we apologize, but we feel that the implications of the majority opinion are of an economic importance far beyond the loss or gain of the four thousand odd dollars involved in this action.

The majority opinion says that some 1300 gin yard receipts delivered by a warehouseman Eloy to Smith purporting on their faces to be negotiable warehouse contracts are not contracts at all, but merely "no risk" parking tickets because they were issued pursuant to a prior purchase contract which said "Insurance at sellers risk till payment completed". As the majority opinion notes, Smith is a large operator in the cotton field and it would be normal for it to have such receipts in its possession, and if the conduct of its business so dictated to negotiate the same to others. If the opinion of the majority stands, it is notice to all purchasers of such receipts from Smith that before they can safely purchase such receipts that they must first investigate the circumstances under which the receipts were issued. This will obviously defeat the commercial purpose of negotiability in warehouse receipts. Nor need its effects be limited to Smith. It is not unreasonable to assume that the practices and routine contract forms in the field of the cotton industry are fairly well standardized and therefore, the opinion of the majority may well

cause at least, uncertainty in the commercial cotton field from Anderson Clayton Company, the largest in the world, down to the smallest.

We respectfully submit that a rehearing should be granted.

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CERTIFICATE

The undersigned attorneys for Appellant hereby certify that they prepared the foregoing "Petition for Rehearing on Behalf of Appellant"; that they know the contents thereof, and that in ~~their judgment and in the judgment of each of them~~ the said petition is well founded and that it is not interposed for delay.

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